Supreme Court, U.S.
FILED

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No. _____

In The
Supreme Court of the United States

ALLSTATE INSURANCE COMPANY,

Petitioner,

v.

WILLIAM NOAH, TERRY NOAH, GEORGE GIAKOUMAKIS, MARY LOU GIAKOUMAKIS, CHERYL MONDHEIM, JAMES HOUSE, and PAT HOUSE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

PETER H. KLEE
JOHN T. BROOKS*
NATHAN S. ARRINGTON
LUCE FORWARD HAMILTON & SCRIPPS LLP
600 West Broadway, 26th Floor
San Diego, CA 92101
(619) 236-1414

Counsel for Petitioner

**Counsel of Record*

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QUESTION PRESENTED FOR REVIEW

In seeking to remedy perceived abuses by some members of an industry, may a legislature retroactively nullify the substantial contractual rights of all members of that industry, without regard to culpability? Specifically, in enacting a law to provide a remedy for insureds who were misled by insurers about the extent of their 1994 Northridge earthquake damages, is it consistent with the Contract Clause of the United States Constitution for the California legislature to deprive all insurers of their contractual right to be free of time-barred claims, without requiring any showing that the insurer engaged in the misconduct the statute is designed to remedy?

PARTIES AND RULE 29.6 STATEMENT

Petitioner Allstate Insurance Company is an Illinois corporation admitted to transact insurance business in California and other states. Allstate Insurance Company is a wholly owned subsidiary of The Allstate Corporation, a publicly traded Delaware corporation. No publicly held company owns 10% or more of The Allstate Corporation's stock.

There are 28 plaintiffs in the proceeding in the court whose judgment is sought to be reviewed. The judgment to be reviewed pertains to only the following seven plaintiffs: William and Terry Noah, George and Mary Lou Giakoumakis, Cheryl Mondheim, and James and Pat House.

The remaining 21 plaintiffs are: Vito Campanelli, Peggy Campanelli, John Caudillo, Barbara Caudillo, Neil Damrow, Gayle Damrow, Nancy Durrant, Garfield Ecung, Debra Ecung, Donald Huner, Tommie Jenkins, Carrie Jenkins, Brenda Kalosh, Donald Menck, Florence Menck, Roy Rosenblatt, Lorraine Rosenblatt, Darla Severn, Loyal Smith, Mildred Stafford, and Marilyn Taber.

Other defendants in the proceeding are Shadowbrook Design Group, Inc., a California Corporation; and W.S.C., a California Corporation (dba Western States Construction, dba Western States Geotechnical, aka Western States Companies).

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
PARTIES AND RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	iv
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS AND ORDERS BELOW	1
STATEMENT OF JURISDICTION	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
REASONS THE PETITION SHOULD BE GRANTED	8
I. SUMMARY OF ARGUMENT	8
II. CALIFORNIA CODE OF CIVIL PROCEDURE SECTION 340.9 VIOLATES THE CONTRACT CLAUSE BY IMPOSING COLLECTIVE PUNISHMENT WITHOUT REGARD TO INDIVIDUAL CULPABILITY	10
A. The Contract Clause Protects Private Rights Against Encroachment Based Upon Public Whims And Passing Passions	10
B. Section 340.9 Substantially Impairs Contracts	12
C. On Its Face And As Applied To The Homeowners Here, Section 340.9 Violates The Contract Clause Because It Is Not Tailored To Its Stated Purpose	14
CONCLUSION	18
APPENDIX	App. 1

TABLE OF AUTHORITIES

Page

CASES

20th Century Ins. Co. v. Superior Court, 90 Cal.App.4th 1247, 109 Cal.Rptr.2d 611 (2001) 15

Allied Structural Steel v. Spannaus, 438 U.S. 234, 57 L.Ed.2d 727, 98 S.Ct. 2716 (1978) 12

Bollinger v. National Fire Ins. Co., 25 Cal.2d 399, 154 P.2d 399 (1944) 15

Chase v. Blue Cross of California, 42 Cal.App.4th 1142, 50 Cal.Rptr.2d 178 (1996) 17

Chrysler Corp. v. Kolosso Auto Sales, Inc., 148 F.3d 892 (7th Cir. 1998) 13

Eastern Enterprises v. Apfel, 524 U.S. 498, 141 L.Ed.2d 451, 118 S.Ct. 2131 (1998) 11

Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400, 74 L.Ed.2d 569, 103 S.Ct. 697 (1983) 12, 13, 14

Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810) 10

Hellinger v. Farmers Group, Inc., 91 Cal.App.4th 1049, 111 Cal.Rptr.2d 268 (2001) 12

Landgraf v. USI Film Products, 511 U.S. 244, 128 L.Ed.2d 229, 114 S.Ct. 1483 (1994) 11

Prudential-LMI Com. Ins. v. Superior Court, 51 Cal.3d 674, 274 Cal.Rptr.2d 387 (1990) 4

State Farm Fire & Cas. Co. v. Superior Court, 210 Cal.App.3d 604, 258 Cal.Rptr. 413 (1989) 14

Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819) 10

TABLE OF AUTHORITIES – Continued

Page

Veix v. Sixth Ward Bldg. & Loan Assn., 310 U.S. 32, 84 L.Ed. 1061, 60 S.Ct. 792 (1940) 13

Vu v. Prudential Prop. & Cas. Ins. Co., 26 Cal.4th 1142, 113 Cal.Rptr.2d 70 (2001) ..... *passim*

STATUTES

28 U.S.C. § 1331 4

28 U.S.C. § 2403(b) 2

California Code of Civil Procedure § 340.9 ..... *passim*

California Insurance Code § 2071 ..... 3, 7

OTHER

Assem. Com. on Judiciary, Analysis of Sen. Bill No. 1899 (1999-2000 Reg. Sess.) 6, 13, 17

Sen. Com. on Judiciary, Analysis of Sen. Bill No. 1899 (1999-2000 Reg. Sess.) 6, 16, 17

The Federalist No. 44 8

U.S. Const. art. I, § 10, cl. 1 ..... 2, 10

PETITION FOR A WRIT OF CERTIORARI

Allstate Insurance Company respectfully petitions this Court for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

OPINIONS AND ORDERS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 322 F.3d 1086 (2003) and is reproduced in the appendix at App. 1. The order of the United States Court of Appeals for the Ninth Circuit denying petitioner's petition for panel rehearing is reproduced at App. 64.

The opinion of the United States District Court for the Central District of California regarding plaintiffs William and Terry Noah is reported at 119 F.Supp.2d 1073 (C.D. Cal. 2000) and is reproduced in the appendix at App. 23. The opinion of the United States District Court for the Central District of California regarding plaintiffs George and Mary Lou Giakoumakis is reported at 97 F.Supp.2d 1211 (C.D. Cal. 2000) and is reproduced in the appendix at App. 30. The opinion of the United States District Court for the Central District of California regarding plaintiff Cheryl Mondheim is unreported and is reproduced in the appendix at App. 38. The opinion of the United States District Court for the Central District of California regarding plaintiffs James and Pat House is reported at 85 F.Supp.2d 980 (C.D. Cal. 2000) and is reproduced in the appendix at App. 51.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered its judgment on March 3, 2003. That court denied petitioner's timely petition for panel rehearing on June 2, 2003. This Court has jurisdiction under 28 U.S.C. § 1254.

Because this petition calls into question the constitutionality of California Code of Civil Procedure § 340.9, 28 U.S.C. § 2403(b) may apply. Pursuant to 28 U.S.C. § 2403(b), the United States Court of Appeals for the Ninth Circuit notified the California Attorney General of the fact that the constitutionality of California Code of Civil Procedure § 340.9 was drawn into question.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This petition for a writ of certiorari involves:

(1) The Contract Clause of the Constitution of the United States, U.S. Const. Art. I, § 10, cl. 1, which provides that "No State shall . . . pass any . . . Law impairing the Obligation of Contracts"; and

(2) California Code of Civil Procedure § 340.9, which is reproduced in full in the appendix. (App. 69.)

STATEMENT OF THE CASE

This petition raises the issue of whether the California legislature acted constitutionally when it retroactively deprived all insurers of the benefits of a substantial

contractual provision, without regard to whether any particular insurer engaged in the type of misconduct the legislation was designed to remedy. This issue is of substantial importance not only to the affected insurers, but to other members of groups in political or public disfavor whose rights are vulnerable to attack.

This case arises out of claims for insurance benefits made to Allstate by William and Terry Noah, George and Mary Lou Giakoumakis, Cheryl Mondheim, and James and Patricia House (collectively, the "Homeowners"). At the time of the January 17, 1994 Northridge, California earthquake, the Homeowners were insured by Allstate. The Homeowners' Allstate policies each contained the following provision:

> No suit or action may be brought against [Allstate] unless there has been full compliance with the policy terms. Any suit or action must be brought within one year after the date of the loss.

By law, all other homeowners insurance policies in California contained a similar provision at least as favorable to the insured. Cal. Ins. Code § 2071; App. 6-7. Such limitations provisions have repeatedly been upheld as consistent with the public policy of preventing fraud and ensuring the diligent prosecution of claims before evidence is lost. *See, e.g., State Farm Fire & Cas. Co. v. Superior Court,* 210 Cal.App.3d 604, 612, 258 Cal.Rptr. 413 (1989).

The one-year period begins running when the insured becomes aware of appreciable damage; is tolled when the insured files a claim; and begins running again after the insurer unequivocally closes the claim (*e.g.*, by final

payment or denial). *Prudential-LMI Com. Ins. v. Superior Court*, 51 Cal.3d 674, 693, 274 Cal.Rptr.2d 387 (1990).

Longstanding California law also precludes insurers from asserting the limitations provision if the insurer misled the insured about the extent of his or her damage. *See, e.g., Vu v. Prudential Prop. & Cas. Ins. Co.*, 26 Cal.4th 1142, 1152-53, 113 Cal.Rptr.2d 70 (2001). As acknowledged by the Ninth Circuit, *Vu* clarified existing California law providing that:

> [W]hen an insurer makes representations of fact regarding the value of an insured's claim, the insurer is estopped from later raising the limitations period as a defense, if the insured reasonably relied on the representations. [citation omitted] There is no need to show that the insurer committed fraud or intended to mislead the insured, only that the insured reasonably relied on the insurer's representations. (App. 8)

Although the earthquake occurred in January 1994, the Homeowners did not file suit against Allstate until January 22, 1998, when they and 21 other plaintiffs sued Allstate in United States District Court for the Central District of California. The Homeowners alleged that Allstate failed to pay all the insurance benefits to which they were entitled as a result of damage caused by the 1994 earthquake. The suit included causes of action for breach of contract, tortious breach of the implied covenant of good faith and fair dealing, civil RICO violations, negligence, and negligent and intentional deceit. The district court had jurisdiction under 28 U.S.C. § 1331.

Allstate moved for summary judgment against each Homeowner on the ground that the claims were barred by the contractual one-year suit limitation provision. (App.

25, 32, 40, 53) In opposition, the Homeowners argued that Allstate should be estopped from asserting the one-year provision, but failed to produce evidence showing that the reason they had belatedly filed suit was because they had reasonably relied upon any misrepresentation by Allstate. The District Court granted Allstate's motions and entered judgment for Allstate. (App. 29, 37, 49, 63) Each Homeowner appealed to the United States Court of Appeals for the Ninth Circuit.

In 2000, the California legislature enacted California Code of Civil Procedure § 340.9. The stated purpose of the statute was to provide a remedy for insureds who had been misled by their insurers about the extent of their damage, and who were subsequently precluded by the one-year provision from filing suit:

> The bill's author believed that the one-year limitations period had barred victims from being fairly compensated after they had been misled about the extent of their losses.

(App. 18) The broader legislative history, including the California Senate and Assembly judiciary committee analyses, likewise identified the problem of insurer deception as the validating purpose of the statute. In concluding there was a legitimate public purpose for Section 340.9 sufficient to justify the deprivation of contract rights, the Senate Judiciary Committee observed:

> Proponents assert that ample evidence exists to show that insurers handling Northridge earthquake claims engaged in a systematic program of misleading consumers about the nature and extent of damage to their homes. Later, when it became clear that the problems were indeed significant, proponents assert that the insurers

> refused to pay claims on the basis that the claims were too late.

Sen. Com. on Judiciary, Analysis of Sen. Bill No. 1899 (1999-2000 Reg. Sess.) as amended May 9, 2000, at 5 (www.leginfo.ca.gov/pub/99-00/bill/sen/sb_1851-1900/sb_1899_cfa_20000516_163922_sen_comm.html). *Accord,* Assem. Com. on Judiciary, Analysis of Sen. Bill No. 1899 (1999-2000 Reg. Sess.) as amended May 23, 2000, at 8 (www.leginfo.ca.gov/pub/99-00/bill/sen/sb_1851-1900/sb_1899_cfa_20000619_115754_asm_comm.html).

Despite the purpose of the statute to provide a remedy for insureds who had been misled to their detriment, Section 340.9 includes no provision limiting its application to insureds who had been misled or to insurers which had been guilty of any misconduct. Section 340.9 provides in pertinent part:

> Notwithstanding any other provision of law or contract, any insurance claim for damages arising out of the Northridge earthquake of 1994 which is barred as of the effective date of this section [January 1, 2001] solely because the applicable statute of limitations has or had expired is hereby revived and a cause of action thereon may be commenced provided that the action is commenced within one year of the effective date of this section. (App. 69)

Section 340.9 took effect while the appeals were pending. As a result of the new statute, the Homeowners argued on appeal that their time-barred claims were now revived, and thus that the judgments had to be reversed. (App. 6) Allstate argued that Section 340.9 is unconstitutional. (App. 6)

Applying the rule that a court should not unnecessarily reach constitutional questions, the Ninth Circuit initially examined whether anything other than Section 340.9 precluded Allstate from asserting the one-year limitation provision. First, the Ninth Circuit concluded that the claims were in fact time-barred under the terms of the contract, even after allowing for the tolling period during Allstate's processing of the claims. (App. 7-8)

Next, the Ninth Circuit considered whether the Homeowners had evidence that they had been misled by Allstate, such that the court could avoid the constitutional issue by finding a triable issue of estoppel under *Vu*, 26 Cal.4th 1142. The court held that the Homeowners had failed to produce such evidence of misleading conduct. (App. 8-9)

Finally, the Ninth Circuit concluded that, assuming constitutionality, Section 340.9 would revive the Homeowners' time-barred claims. (App. 9-15)

The Ninth Circuit then confronted the Contract Clause issue. The Ninth Circuit held in Allstate's favor on the threshold question of whether Section 340.9 substantially impairs contracts:

> *Section 340.9 substantially impairs contracts* between insurers and insured [sic]. It revives claims that would otherwise be barred by the contractual limitations period included in most insurance contracts pursuant to [California Insurance Code] § 2071. It subjects the insurers to potential liability that they believed had long since been put to rest. (App. 17 (emphasis added))

Despite this finding, however, the court concluded that Section 340.9 served a legitimate public purpose, and was "of a character appropriate to the public purpose justifying [the legislation's] adoption." (App. 18-19) The court therefore held Section 340.9 to be constitutional.

The Ninth Circuit rejected Allstate's argument that the stated public purpose of Section 340.9 – protecting insureds who had been misled by insurers – was already achieved by existing California estoppel law as described in *Vu*. The Ninth Circuit also rejected Allstate's argument that Section 340.9 swept too broadly. The Ninth Circuit held that Section 340.9 provided more "complete" protection than existing estoppel law because "it eliminates the need for an insured to present any evidence of the misrepresentations that are a base requirement for equitable estoppel. . . . " (App. 19) The court did not explain how eliminating the need for evidence that an insured was misled was consistent with or furthered the stated statutory purpose of providing a remedy for insureds who had been misled.

REASONS THE PETITION SHOULD BE GRANTED

I.

SUMMARY OF ARGUMENT

The Contract Clause is a "constitutional bulwark in favor of personal security and private rights." The Federalist No. 44, at 301. It provides particular protection to disfavored groups whose rights are vulnerable to attack based upon shifting political winds. To satisfy the Contract Clause, any law that substantially impairs contracts must

do so for a legitimate public purpose, and be reasonably tailored to that purpose.

Section 340.9 violates the Contract Clause because it makes no attempt to tailor its sweeping remedy to its stated purpose. The stated purpose of the statute was to provide a remedy for insureds who had been misled by their insurers about the extent of their Northridge earthquake damage. Yet the statute deprives every insurer of the benefit of the contractual limitation provision, without requiring any showing that the insurer acted culpably or that the insured had been misled. It imposes collective punishment on an entire industry for the perceived abuses of some insurers in handling some claims.

The impairment of contract is absolute for each affected contract, and massive in the aggregate. For each affected contract, Section 340.9 takes away the contractual right to be free from liability and replaces that right with a statutory regime of full liability. In the aggregate, Section 340.9 has spawned lawsuits by thousands of insureds – including many who, like the Homeowners here, cannot show that they were misled – and imposed enormous investigative and legal costs that insurers had a vested contractual right to avoid. Moreover, by reopening claims years after the earthquake when evidence is lost and memories have faded, Section 340.9 invites fraud on a massive scale.

The constitutional infirmities of Section 340.9 implicate issues important to the country's entire business community, and in particular to groups that in any given year may fall into public or political disfavor. Approving such a sweeping governmental abrogation of private contractual rights, years after the fact and without regard

to the culpability of the party whose rights are taken away, must gravely concern banks, accounting firms, securities firms, power companies, landlords, and any other businesses which depend on the stability and enforceability of contracts.

II.

CALIFORNIA CODE OF CIVIL PROCEDURE SECTION 340.9 VIOLATES THE CONTRACT CLAUSE BY IMPOSING COLLECTIVE PUNISHMENT WITHOUT REGARD TO INDIVIDUAL CULPABILITY

A. The Contract Clause Protects Private Rights Against Encroachment Based Upon Public Whims And Passing Passions

The Contract Clause prohibits legislation that impairs contractual obligations. U.S. Const. art. I, § 10, cl. 1. The clause protects citizens "from the effects of those sudden and strong passions to which men are exposed." *Fletcher v. Peck,* 10 U.S. (6 Cranch) 87, 137-138 (1810). A guiding principle in contract clause interpretation is the "necessity and policy of giving permanence and security to contracts, of withdrawing them from the influence of legislative bodies, whose fluctuating policy, and repeated interferences, produced the most perplexing and injurious embarrassments. . . ." *Trustees of Dartmouth College v. Woodward,* 17 U.S. (4 Wheat.) 518, 648 (1819) (majority opinion of Marshall, C.J.).

Retroactive statutes are subject to particular constitutional scrutiny because of the danger they pose to unpopular groups. As the United States Supreme Court recently explained, "[r]etroactivity is generally disfavored in the

law," and "for centuries our law has harbored a singular distrust of retroactive statutes." *Eastern Enterprises v. Apfel*, 524 U.S. 498, 532, 547, 141 L.Ed.2d 451, 118 S.Ct. 2131 (1998) (plurality opn. of O'Connor, J. and concurring and dissenting opn. of Kennedy, J.). This distrust "recogni[zes] that retroactive lawmaking is a particular concern for the courts because of the legislative 'temptation to use retroactive legislation as a means of retribution against unpopular groups or individuals.'" *Id.* at 548 (Kennedy, J., concurring and dissenting) (quoting *Landgraf v. USI Film Products*, 511 U.S. 244, 266, 128 L.Ed.2d 229, 114 S.Ct. 1483 (1994)). As Justice Kennedy explained in the related context of due process protection:

> Groups targeted by retroactive laws, were they to be denied all protection, would have a justified fear that a government once formed to protect expectations can now destroy them. Both stability of investment and confidence in the constitutional system, then, are secured by due process restrictions against severe retroactive legislation.

Id. at 549 (Kennedy, J., concurring and dissenting).

As set forth below, Section 340.9 violates the contract clause because it effects a dramatic impairment of a contract provision that has been upheld for decades as advancing public policy, without any attempt to tailor the impairment to the perceived injustice addressed by the statute. Each member of the industry is uniformly punished, without regard to its individual culpability. Every insured is granted new contractual rights at the insurer's expense, without any requirement that the insured show that he or she had been misled.

B. Section 340.9 Substantially Impairs Contracts

To evaluate whether legislation unconstitutionally alters parties' contractual commitments, the Court has developed a three-part test. *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411-13, 74 L.Ed.2d 569, 103 S.Ct. 697 (1983). The first part of the test asks whether the state law operates as a "substantial impairment" of a contractual relationship. *Id.*, 459 U.S. at 411.

Section 340.9 substantially impairs contract rights. By reviving lapsed Northridge earthquake claims, Section 340.9 grants insureds a new right to claim contract benefits while wiping out the insurers' existing contractual right to repose from stale claims. The Ninth Circuit found that Section 340.9 does substantially impair contract rights. (App. 17) *See also Hellinger v. Farmers Group, Inc.*, 91 Cal.App.4th 1049, 1066, 111 Cal.Rptr.2d 268 (2001) ("We agree that reviving contract-barred claims [under Section 340.9] constitutes an impairment of contract.").

Moreover, in Contract Clause analysis, "[t]he severity of the impairment measures the height of the hurdle the state legislation must clear." *Allied Structural Steel v. Spannaus,* 438 U.S. 234, 245, 57 L.Ed.2d 727, 98 S.Ct. 2716 (1978). "Minimal alteration of contractual obligations may end the inquiry at its first stage. Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation." *Ibid.*

Here, the impairment is absolute. The question is not one of modifying by degrees a party's contractual rights, but rather of replacing a guarantee of no contractual liability with full contractual liability. Moreover, the scope

of the impairment is massive, affecting hundreds of thousands of Northridge earthquake claims. Assem. Com. on Judiciary, Analysis of Sen. Bill No. 1899 (1999-2000 Reg. Sess.) as amended May 23, 2000, at 2 (www.leginfo.ca.gov/pub/99-00/bill/sen/sb_1851-1900/sb_1899_cfa_20000619_115754_asm_comm.html). Under Section 340.9, each of those claimants is permitted to bring renewed claims against insurers, imposing on insurers not only potential contractual liability, but the certainty of enormous investigative and litigation costs that otherwise would have been precluded by contract. Because of the passage of time and loss of evidence, the potential for fraudulent and abusive claims is extreme. Thousands of insureds, either individually or in class actions, have brought suit under the statute.

Despite recognizing the impairment, the Ninth Circuit observed that "[t]he severity of the impairment is significantly mitigated . . . by the fact that the California Insurance industry is highly regulated." (App. 17) Here, the Ninth Circuit failed to follow controlling authority of this Court. Although a court may consider a history of regulation, the proper question is not whether the industry was regulated generally, but whether it was regulated "in the particular" respect at issue. *Veix v. Sixth Ward Bldg. & Loan Assn.*, 310 U.S. 32, 38, 84 L.Ed. 1061, 60 S.Ct. 792 (1940); *see also Energy Reserves*, 459 U.S. at 411 (citing *Veix*). "[A] history of regulation is never a sufficient condition for rejecting a challenge based on the contracts clause. . . . The fact that some incidents of a commercial activity are heavily regulated does not put the regulated firm on notice that an entirely different scheme of regulation will be imposed." *Chrysler Corp. v. Kolosso Auto Sales, Inc.*, 148 F.3d 892, 895 (7th Cir. 1998).

Here, while insurers are subject to changing regulation in many respects which they can fairly be required to anticipate, there is no evidence that insurers have been subject to regulation of the contractual limitations provision. To the contrary, contractual limitations periods in insurance policies were originally inserted into policies by insurers, and the only action by the California legislature in respect to those provisions was, in 1909 and in the 1940's, to intervene in favor of the enforceability of such provisions. *Vu*, 26 Cal.4th at 1148.

C. On Its Face And As Applied To The Homeowners Here, Section 340.9 Violates The Contract Clause Because It Is Not Tailored To Its Stated Purpose

If, as here, a state law substantially impairs existing contract rights, it is unconstitutional unless (i) the law serves "a significant and legitimate public purpose," and (ii) "the adjustment of 'the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption.'" *Energy Reserves,* 459 U.S. at 411-12. It is here that Section 340.9 fails.

The purpose of Section 340.9 was not to condemn and eliminate contractual limitations provisions as pernicious in their own right. To the contrary, the contractual one-year provision in insurance contracts has been repeatedly upheld as being consistent with good public policy, including the public policies against fraudulent claims and in favor of repose. *State Farm Fire & Cas. Co. v. Superior Court,* 210 Cal.App.3d 604, 612, 258 Cal.Rptr. 413 (1989) ("limitations periods on suits are designed to promote justice by preventing surprises through revival of stale

claims, to protect defendants and courts from handling matters in which the search for truth may be impaired by loss of evidence, to encourage plaintiffs to use reasonable and proper diligence in enforcing their rights, and to prevent fraud") (quoting *Zieba v. Middlesex Mut. Assoc. Co.*, 549 F.Supp. 1318, 1321 (D. Conn. 1982)); *Vu*, 26 Cal.4th at 1148 (the limitation period "is the result of long insistence by insurance companies that they have additional protection against fraudulent proofs, which they could not meet if claims could be sued upon within four years as in the case of actions on other written instruments") (quoting *Bollinger v. National Fire Ins. Co.*, 25 Cal.2d 399, 407, 154 P.2d 399 (1944). The policy in favor of repose is "no less important or substantial than" the policy in favor of resolution on the merits. *Vu*, 26 Cal.4th at 1148-49. The California legislature did not purport to find otherwise.

Rather, the public purpose identified by the California legislature for enacting Section 340.9 was to protect people who were misled by their insurers:

> The Legislature enacted section 340.9 to alleviate a broad and significant problem caused by the insurers' conduct; to help thousands of policyholders who were misled by the insurers into waiving their right to make claims in a timely manner.

20th Century Ins. Co. v. Superior Court, 90 Cal.App.4th 1247, 1271, 109 Cal.Rptr.2d 611 (2001). The Ninth Circuit agreed, noting "[t]he bill's author believed that the one-year limitations period had barred victims from being fairly compensated after they had been misled about the extent of their losses." (App. 18)

The legislative history is explicit as to the statute's purpose. In a section entitled "Stated purpose for the legislation," the Senate Judiciary Committee's analysis of the bill stated:

> [The author] claims that numerous homeowners and homeowners associations were mislead [sic] about the extent of damage done as a result of the earthquake, and that once they learned the truth they were prohibited by the statute from filing a claim.

Sen. Com. on Judiciary, Analysis of Sen. Bill No. 1899 (1999-2000 Reg. Sess.) as amended May 9, 2000, at 3 (www.leginfo.ca.gov/pub/99-00/bill/sen/sb_1851-1900/sb_1899_cfa_20000516_163922_sen_comm.html). In the same vein, in discussing whether "there are sufficient public policy reasons to support reviving any otherwise barred claims," the Senate Judiciary Committee focused entirely on the perceived problem of deception:

> Proponents contend that there are strong public policy reasons to protect the homeowners under the circumstances of this bill. Proponents argue that thousands of people who suffered damage to their homes did not receive the benefit of their insurance contracts because of the insurance companies' conduct. Proponents assert that ample evidence exists to show that insurers handling Northridge earthquake claims engaged in a systematic program of misleading consumers about the nature and extent of damage to their homes. Later, when it became clear that the problems were indeed significant, proponents assert that the insurers refused to pay claims on the basis that the claims were too late.

Id. at p. 5. The analysis of the Assembly Committee on Judiciary is essentially identical. Assem. Com. on Judiciary, Analysis of Sen. Bill No. 1899 (1999-2000 Reg. Sess.) as amended May 23, 2000, at 8 (www.leginfo.ca.gov/pub/99-00/bill/sen/sb_1851-1900/sb_1899_ cfa_ 20000619_115754_ asm_comm.html).

Assuming that the goal of protecting insureds who were misled by insurers constitutes a legitimate public purpose, Section 340.9 nevertheless violates the Contract Clause because it sweeps far more broadly than its stated purpose. It is thus not based upon "reasonable conditions" and is not reasonably tailored to achieving its stated purpose. This is so for two reasons.

First, to the extent that the statute benefits insureds who have been misled, it is simply redundant of pre-existing California law – including common law equitable estoppel. As recognized in *Vu*, 26 Cal.4th at 1153-54, for example, "[a]n insurer is estopped from asserting a right, even though it did not intend to mislead, as long as the insured reasonably relied to its detriment upon the insurer's action." *Vu,* 26 Cal.4th at 1153 (quoting *Chase v. Blue Cross of California,* 42 Cal.App.4th 1142, 1147, 50 Cal.Rptr.2d 178 (1996)). This existing remedy is broad enough to accomplish the stated purpose of the statute.

Second, even assuming that Section 340.9 provided some extra remedy consistent with the legitimate purpose of the statute to protect insureds who were misled, the statute sweeps far too broadly. It does not, for example, merely relax the requirements for proving misconduct by an insurer, but eliminates any such requirement altogether. By reviving stale claims years after the earthquake, it invites the very fraud that the limitation

provision is designed to prevent. The statute also rewards insureds who failed to timely pursue their claims due to lack of diligence. Section 340.9 thus fails to impose the required "reasonable conditions" upon the deprivation of contractual rights, nor is it reasonably tailored to the statute's stated purpose. It does not punish merely the culpable insurer, but the guiltless one. It does not benefit merely the duped insured, but the insured who knowingly sat on his rights.

Section 340.9 is an instance of collective punishment. The only prerequisite to the punishment is that one be a member of the disfavored group – here, earthquake insurers. If a company is a member of this group, the statute takes away the company's vested contractual rights. The statute imposes no requirement on the insured to show that he is within the class of persons intended to be protected. Nor does the statute provide any mechanism by which an insurer can escape this deprivation, even if the insurer can show that it is innocent of any misconduct.

CONCLUSION

Approving a statute that imposes collective punishment on an entire industry without regard to individual culpability raises profound concerns not just for insurance companies, but for all industries that rely upon the predictable enforcement of contractual rights. For this reason,

and for all of the reasons discussed above, the Court should grant this petition.

Respectfully submitted,

PETER H. KLEE
JOHN T. BROOKS*
NATHAN S. ARRINGTON
LUCE, FORWARD, HAMILTON &
SCRIPPS LLP
600 West Broadway, 26th Floor
San Diego, CA 92101
(619) 236-1414

Counsel for Petitioner

August 29, 2003

**Counsel of Record*

APPENDIX

322 F.3d 1086

Vito CAMPANELLI; Peggy Campanelli; John Caudillo; Barbara Caudillo; Neil Damrow; Gayle Damrow; Nancy Durrant; Garfield Ecung; Debra Ecung; George Giakoumakis; Mary Lou Giakoumakis; Donald Huner; Tommie Jenkins; Carrie Jenkins; Brenda Kalosh; Donald Menck; Florence Menck; Cheryl Mondheim; William Noah; Terry Noah; Roy Rosenblatt; Lorraine Rosenblatt; Darla Severn; Loyal Smith; Mildred Stafford; Marilyn Taber, Plaintiffs,

and

James House; Pat House,
Plaintiffs-Appellants,

v.

ALLSTATE [ ] INSURANCE COMPANY,
an Illinois Corporation,
Defendant-Appellee,

and

Shadowbrook Design Group, Inc., a California Corporation; W.S.C., a California Corporation, dba Western States Construction, dba Western States Geotechnical, aka Western States Companies, Defendants.

Vito Campanelli; Peggy Campanelli; John Caudillo; Barbara Caudillo; Neil Damrow; Gayle Damrow; Nancy Durrant; Garfield Ecung; Debra Ecung; George Giakoumakis; Mary Lou Giakoumakis; James House; Pat House; Donald Huner; Tommie Jenkins; Carrie Jenkins; Brenda Kalosh; Donald Menck; Florence Menck; William Noah; Terry Noah; Roy Rosenblatt; Lorraine Rosenblatt;

Darla Severn; Loyal Smith; Mildred Stafford; Marilyn Taber, Plaintiffs,

and

Cheryl Mondheim, Plaintiff-Appellant,

v.

Allstate [ ] Insurance Company, an Illinois Corporation, Defendant-Appellee,

and

Shadowbrook Design Group, Inc., a California Corporation; W.S.C., a California Corporation, dba Western States Construction, dba Western States Geotechnical, aka Western States Companies Defendants.

Vito Campanelli; Peggy Campanelli; John Caudillo; Barbara Caudillo; Neil Damrow; Gayle Damrow; Nancy Durrant; Garfield Ecung; Debra Ecung; James House; Pat House; Tommie Jenkins; Carrie Jenkins; Brenda Kalosh; Donald Menck; Florence Menck; Cheryl Mondheim; William Noah; Terry Noah; Roy Rosenblatt; Lorraine Rosenblatt; Darla Severn; Loyal Smith; Mildred Stafford; Marilyn Taber; Donald Huber, Plaintiffs,

and

George Giakoumakis; Mary Lou Giakoumakis; Plaintiffs-Appellants,

v.

Allstate [ ] Insurance Company, an Illinois Corporation, Defendant-Appellee.

Vito Campanelli; Peggy Campanelli; John Caudillo; Barbara Caudillo; Neil Damrow; Gayle Damrow; Nancy Durrant; Garfield Ecung; Debra Ecung;

George Giakoumakis; Mary Lou Giakoumakis; James House; Pat House; Donald Huner; Tommie Jenkins; Carrie Jenkins; Brenda Kalosh; Donald Menck; Florence Menck; Cheryl Mondheim; Roy Rosenblatt; Lorraine Rosenblatt; Darla Severn; Loyal Smith; Mildred Stafford; Marilyn Taber, Plaintiffs,

and

**William Noah, Terry Noah,
Plaintiffs-Appellants,**

v.

Allstate [ ] Insurance Company, an Illinois Corporation, Defendant-Appellee,

and

Shadowbrook Design Group, Inc., a California Corporation; W.S.C., a California Corporation, dba Western States Construction, dba Western States Geotechnical, aka Western States Companies, Defendants.

Nos. 00-55466, 00-55468, 00-55957 and 00-57080.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Nov. 5, 2002.

Filed March 3, 2003.

Norman J. Watkins, Lynberg & Watkins, Los Angeles, CA, for plaintiffs-appellants.

Peter H. Klee, Luce, Forward, Hamilton & Scripps, San Diego, CA, for defendant-appellee.

Anne Michelle Burr, Deputy Attorney General, San Francisco, CA, for amicus curiae Bill Lockyer, Attorney General of the State of California, urging reversal.

Stephanie Rae Williams, Horvitz & Levy, Encino, CA, for amici curiae 21st Century Insurance Company and Truck Insurance Exchange, urging affirmance.

Appeals from the United States District Court for the Central District of California; Robert J. Kelleher, District Judge, Presiding. D.C. No. CV 98-7185 RJK.

Before: BRIGHT,* GOODWIN, and TASHIMA, Circuit Judges.

TASHIMA, Circuit Judge:

These are appeals from the district court's grant of summary judgment in favor of appellee, Allstate Insurance Company ("Allstate"), based upon a limitations-period defense. We reverse.

BACKGROUND

Appellants William and Terry Noah, James and Patricia House, Cheryl Mondheim, and George and Mary Lou Giakoumakis (collectively, the "Homeowners") all own homes, insured by Allstate, that were damaged on January 17, 1994, by the Northridge earthquake. Within the next year, all of the Homeowners made claims to Allstate for the earthquake damage to their homes. All of them received payments for the damage and their claims were closed by Allstate over the next two years.

Sometime in May 1998, the Homeowners learned that there were questions regarding the authenticity of the

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* The Honorable Myron H. Bright, United States Circuit Judge for the Eighth Circuit, sitting by designation.

engineering reports they had received from Allstate during the claims adjustment process. The "engineering" reports that each Homeowner received were purportedly signed, stamped, and certified to contain the signing engineer's opinion of the extent of the earthquake damage based upon the engineer's personal inspection of the home. The Homeowners allege that, in fact, the reports were not prepared by engineers, engineers never inspected their homes, and that, as a result, their insurance claims were undervalued, causing the Homeowners to receive less than complete compensation for the damage to their homes.

On September 2, 1998, the Homeowners joined 20 other plaintiffs in a suit against Allstate. In their complaint, they alleged the following causes of action against Allstate: (1) violation of the Racketeer Influenced and Corrupt Organization Act ("RICO"), 18 U.S.C. §§ 1961-68, based on mail fraud; (2) negligence; (3) negligent misrepresentation; (4) intentional misrepresentation; (5) breach of the covenant of good faith and fair dealing; and (6) breach of contract.

Allstate filed separate summary judgment motions against each of the Homeowners, asserting that their claims were barred by the one-year limitations period of their insurance contracts. The district court granted all of these motions. *See Campanelli v. Allstate Ins. Co.,* 119 F.Supp.2d 1073 (C.D.Cal.2000); *Campanelli v. Allstate Ins. Co.,* 97 F.Supp.2d 1211 (C.D.Cal.2000); *Campanelli v. Allstate Ins. Co.,* 85 F.Supp.2d 980 (C.D.Cal.2000).

All of the Homeowners appealed, contending that their claims were not time-barred. The Homeowners base their appeals on several grounds, including: (1) that the limitations period did not begin to run until they

discovered the fraudulent nature of the engineering reports; (2) that Allstate is equitably estopped from asserting the limitations period as an affirmative defense; and (3) that their claims were revived by California Code of Civil Procedure § 340.9, which became effective on January 1, 2001, while these appeals were pending.

DISCUSSION

The Homeowners' argument based on § 340.9 is their strongest and, if upheld, would favorably resolve these appeals. Allstate, however, challenges the constitutionality of § 340.9. "A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them." *Lyng v. Northwest Indian Cemetery Protective Ass'n,* 485 U.S. 439, 445-46, 108 S.Ct. 1319, 99 L.Ed.2d 534 (1988). Therefore, we will address the constitutionality of § 340.9 only if none of the Homeowners' other grounds would resolve all of these appeals in the Homeowners' favor. *See id.* at 446, 108 S.Ct. 1319.

I Inception of the Loss

The district court granted summary judgment against the Homeowners on all of their claims, finding that the one-year limitations period under their contracts, which conformed to California Insurance Code § 2071, had expired. Section 2071 is not technically a statute of limitations. Rather than directly imposing a limitations period on certain causes of action, § 2071 provides a standard insurance contract for all insurance policies that include fire coverage. This contract must include the following limitations period provision:

> No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with, and unless commenced within 12 months next after inception of the loss.

Cal. Ins.Code § 2071. Under this provision, any claim that is "on the policy" must be brought within 12 months of the "inception of the loss" or it is time-barred.

The Homeowners argue that their claims are not barred by the expiration of the one-year limitations period because the period did not begin to run until the Homeowners discovered that Allstate had hidden the true extent of the damage to their homes. We cannot agree. Under California law, the one-year limitations period begins to run at the time of the inception of the loss, which is "that point in time when appreciable damage occurs and is or should be known to the insured, such that a reasonable insured would be aware that his notification duty under the policy has been triggered." *Prudential-LMI Commercial Ins. v. Superior Court,* 51 Cal.3d 674, 274 Cal.Rptr. 387, 798 P.2d 1230, 1232 (1990). The inception of the loss occurs when the insured should have known that appreciable damage had occurred, not when the homeowner learned the true extent of the damage. *See id.*

In these cases, the inception of the loss occurred when the Homeowners realized that their homes had been damaged by the Northridge earthquake. All of the Homeowners clearly realized that they had suffered sufficient damage to warrant contacting Allstate, because they did, in fact, contact Allstate. As a result, the inception of the loss in this case was January 17, 1994, the date of the Northridge earthquake, and the one-year limitations

period began to run on that date. The Homeowners' complaint was filed on September 2, 1998. Even taking into consideration the fact that the limitations period was tolled during Allstate's processing of the claims, the one-year limitations period had expired for those claims that were covered by that limitations period.

II Estoppel

The Homeowners argue that even if the one-year limitations period had expired at the time that their lawsuit was filed, Allstate is now equitably estopped from asserting the limitations period as a defense because of the Homeowners' reliance on the allegedly fraudulent engineering reports provided by Allstate.

In *Vu v. Prudential Property & Casualty Insurance Co.*, 26 Cal.4th 1142, 113 Cal.Rptr.2d 70, 33 P.3d 487 (2001), the California Supreme Court recently clarified California equitable estoppel law as it relates to insurance limitations periods. *Vu* established that when an insurer makes representations of fact regarding the value of an insured's claim, the insurer is estopped from later raising the limitations period as a defense, if the insured reasonably relied on the representations. *Id.* 113 Cal.Rptr.2d 70, 33 P.3d at 493. There is no need to show that the insurer committed fraud or intended to mislead the insured, only that the insured reasonably relied on the insurer's representations. *Id.*

The Homeowners' case for equitable estoppel appears strong, as it is alleged in their complaint. They claim that they received fraudulently-prepared engineering reports from Allstate that understate the damage to their homes and that they relied on these reports to their detriment.

The difficulty in their cases arises from their failure to present certain evidence to oppose Allstate's summary judgment motion.

Homeowners House and Mondheim cannot succeed on their claim for equitable estoppel because they did not present any evidence that showed that they had received the engineering reports mentioned in the complaint or that Allstate had made any representations of fact regarding the extent of the damage to their homes. Without this evidence, these appellants cannot claim to have reasonably relied on a misrepresentation by Allstate. Therefore, Allstate is not estopped from asserting the limitations period as a defense against these Homeowners.

III Section 340.9

Because the limitation period has expired for those claims that are "on the policy" and Allstate is not equitably estopped from raising the limitations period as a defense against some of the Homeowners, we now address the question of whether § 340.9 revives the time-barred claims. We hold that it does and that such revival is constitutional.

Section 340.9 came into effect on January 1, 2001. It revives "insurance claim[s] for damage arising out of the Northridge earthquake" that are barred "solely because the applicable statute of limitations has or had expired. . . . " § 340.9(a).[1] Section 340.9 also revives claims

[1] Section 340.9 provides, in full:

(a) Notwithstanding any other provision of law or contract, any insurance claim for damages arising out of the

(Continued on following page)

that are barred by statutorily-mandated contractual limitations periods, such as those involved in this case. *See* § 340.9(a) (reviving claims "[n]otwithstanding any other provision of law or contract"); *20th Century Ins. Co. v. Superior Court,* 90 Cal.App.4th 1247, 109 Cal.Rptr.2d 611, 634-35 (2001).

Section 340.9 applies only to cases in which the insured contacted the insurer prior to January 1, 2000,

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Northridge earthquake of 1994 which is barred as of the effective date of this section solely because the applicable statute of limitations has or had expired is hereby revived and a cause of action thereon may be commenced provided that the action is commenced within one year of the effective date of this section. This subdivision shall only apply to cases in which an insured contacted an insurer or an insurer's representative prior to January 1, 2000, regarding potential Northridge earthquake damage.

(b) Any action pursuant to this section commenced prior to, or within one year from, the effective date of this section shall not be barred based upon this limitations period.

(c) Nothing in this section shall be construed to alter the applicable limitations period of an action that is not time barred as of the effective date of this section.

(d) This section shall not apply to either of the following:

(1) Any claim that has been litigated to finality in any court of competent jurisdiction prior to the effective date of this section.

(2) Any written compromised settlement agreement which has been made between an insurer and its insured where the insured was represented by counsel admitted to the practice of law in California at the time of the settlement, and who signed the agreement.

Cal.Civ.Proc.Code § 340.9.

regarding potential Northridge earthquake damage. § 340.9(a). It gave plaintiffs until January 1, 2002, to bring suit on their revived claims. § 340.9(b). Finally, § 340.9 has no effect on any claim that had been "litigated to finality in any court of competent jurisdiction" prior to January 1, 2001. § 340.9(d).

A. *"Litigated to Finality."*

Allstate asserts that the Homeowners' claims are not revived by § 340.9 because the district court orders granting summary judgment in favor of Allstate were all filed prior to January 1, 2001. Allstate argues that because these orders are "final judgments," the claims have been litigated to finality and are not revived by § 340.9. We reject this argument and hold that, for purposes of § 340.9, a claim has not been litigated to finality until there has been a "final resolution of the matter on appeal" or until the time for taking an appeal has expired without an appeal having been taken. *Hellinger v. Farmers Ins. Exchange,* 91 Cal.App.4th 1049, 111 Cal.Rptr.2d 268, 277-78 (2001); *see also Vu v. Prudential Prop. & Cas. Ins. Co.,* 291 F.3d 603, 605 (9th Cir. 2002); *Bialo v. W. Mut. Ins. Co.,* 95 Cal.App.4th 68, 115 Cal.Rptr.2d 3, 13-14 (2002).

Although the judgments entered against Homeowners were "final judgments," the Homeowners' claims had not been litigated to finality. Under California law, "[a]n action is deemed to be pending from the time of its commencement until its final determination upon appeal. . . ." *Hellinger,* 111 Cal.Rptr.2d at 277 (quoting *McKee v. Nat'l Union Fire Ins. Co.,* 15 Cal.App.4th 282, 19 Cal.Rptr.2d 286, 289 (1993) (quoting Cal.Code Civ. Proc. § 1049)); *see also In re Marriage of Buol,* 39 Cal.3d 751, 218 Cal.Rptr.

31, 705 P.2d 354, 356 (1985) (holding that proceedings that were on appeal were "not yet final"). Because the Homeowners' claims were on appeal on January 1, 2001, they were not litigated to finality and are within the scope of § 340.9.[2]

B. *Tort and RICO claims*

Allstate also asserts that even if § 340.9 applies to the Homeowners' claims, it revives only their contract claim, not their tort claims. It contends that "insurance claims for damages," under § 340.9, do not include tort claims.

The California courts of appeal that have dealt with § 340.9 have not so limited its reach. In *Bialo,* 115 Cal.Rptr.2d at 13, the court revived plaintiff's claims for breach of contract and tortious breach of the covenant of good faith and fair dealing. In *Hellinger,* 111 Cal.Rptr.2d at 283-84, the court revived plaintiff's claims for bad faith and punitive damages. In *20th Century,* the court held that § 340.9 revived the plaintiff's breach of contract and breach of the covenant of good faith and fair dealing claims, but held that § 340.9 did not revive the plaintiff's fraud claim because that claim was not covered by the one-year limitations period for insurance claims in the first place. 109 Cal.Rptr.2d at 638.

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[2] The meaning of "litigated to finality" is to be determined under state law because it defines one limit of the substantive right created by § 340.9. Thus, contrary to Allstate's contention, the meaning of such terms as "final judgment" for federal procedural purposes is not controlling.

We hold that § 340.9 revives all causes of action that fall within the limitations period of Insurance Code § 2071. Section 340.9 revives "any insurance claim for damages" that is barred solely because the statute of limitations has expired. Under California law any claim that is "grounded in a failure to pay benefits that are due under the policy" is treated as "on the policy" for purposes of § 2071's limitations period. *Prieto v. State Farm Fire & Cas. Co.,* 225 Cal.App.3d 1188, 275 Cal.Rptr. 362, 365-66 (1990). There is no indication that the California legislature intended to revive only a subset of the actions that would be barred by the statutorily-imposed insurance limitations period. Therefore, any claim that is covered by the one-year limitations period of Insurance Code § 2071 is revived by § 340.9.

As a result, we must next decide which of the claims are covered by § 2071's one-year limitations period in order to determine which causes of action are revived by § 340.9. The one-year limitations period applies to all claims that are "grounded in a failure to pay benefits that are due under the policy." *Id.* at 365-66. "[A]n action seeking damages recoverable under the policy for a risk insured under the policy" is "on the policy" and covered by the one-year limitations period. *Jang v. State Farm Fire & Cas. Co.,* 80 Cal.App.4th 1291, 95 Cal.Rptr.2d 917, 924 (2000) (holding that claims for civil conspiracy and bad faith were on the policy); *see also CBS Broad. Inc. v. Fireman's Fund Ins. Co.,* 70 Cal.App.4th 1075, 83 Cal.Rptr.2d 197, 203 (1999) (holding that action for breach of good faith and fair dealing was on policy). The fact that an insured seeks damages in addition to those covered by the policy will not render the cause of action "off the policy." *See*

Velasquez v. Truck Ins. Exch., 1 Cal.App.4th 712, 5 Cal.Rptr.2d 1, 5-6 (1991).

The Homeowners' causes of action for negligence and for breach of the covenant of good faith and fair dealing are "on the policy." Those claims are based on Allstate's alleged mishandling of the Homeowners' claims and seek to recover damages based on the underpayment of their claims.

The Homeowners' causes of action for negligent and intentional misrepresentation are also on the policy and thus are revived by § 340.9. These causes of action also seek to recover for damage to their homes that the Homeowners allege should have been covered under their respective insurance policies. The complaint also alleges that Allstate's misrepresentations involved "the scope, competence and fairness of the investigations into the [Homeowners'] claim for covered loss under the policy." These claims are "grounded in a failure to pay benefits that are due under the policy" and are therefore covered by the one-year limitations period. *Prieto,* 275 Cal.Rptr. at 365-66.

All of Homeowners' state-law causes of action are revived, removing any limitations-period defense Allstate may have had regarding those claims. This leaves only the RICO claims. The parties contest whether the RICO claims are "on the policy" and whether the contractual limitations periods, which are mandated by state law, could shorten the limitations period of a federal cause of action if they were. We need not, however, reach this issue on these appeals. Regardless of the answer to this question, the RICO claims are not time-barred by § 2071's limitations period. On the one hand, if the one-year

limitations period does not apply to or cannot alter the limitations period of the RICO claims, then the district court's summary judgment based on the one-year limitations period must be reversed. On the other hand, if § 2071's one-year limitations period does apply to the RICO claim and can affect its limitation period, then the one-year limitations period was, like the state-law claims, reinstated by § 340.9.[3] In either event, the RICO claims are not barred by § 2071's one-year limitations period, which was the basis of the district court's summary judgment.

C. *Contract Clause*

Because we have held that § 340.9 revives the Homeowners' previously-barred claims, we must reach Allstate's constitutional challenges to the statute. First, Allstate asserts that if § 340.9 revives the Homeowners' claims, then it violates the contract clauses of both the federal and California Constitutions. The federal Constitution provides that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts." U.S. Const., art. I, § 10, cl. 1. The California Constitution provides that a "law impairing the obligation of contracts may not be passed." Cal. Const., art. I, § 9. The California Supreme Court uses the federal Contract Clause analysis for determining whether a

[3] Although we hold that § 340.9 removes any state-law limitations period defense that Allstate may have, the question of whether § 340.9 can revive a RICO claim, if the federal four-year limitations period has already expired, remains open. This question is not before us in this case because Allstate's summary judgment motions were based only on § 2071's one-year limitations period.

statute violates the parallel provision of the California Constitution. *See Calfarm Ins. Co. v. Deukmejian,* 48 Cal.3d 805, 258 Cal.Rptr. 161, 771 P.2d 1247, 1262-63 (1989) (holding that a statute that passed the federal test did not violate either the federal or state Constitutions).

"Although the language of the Contract Clause is facially absolute, its prohibition must be accommodated to the inherent police power of the State. . . ." *Energy Reserves Group, Inc. v. Kansas Power & Light Co.,* 459 U.S. 400, 410, 103 S.Ct. 697, 74 L.Ed.2d 569 (1983). The threshold inquiry in Contract Clause analysis is " 'whether the state law has, in fact, operated as a substantial impairment of a contractual relationship.' " *Id.* at 411, 103 S.Ct. 697 (quoting *Allied Structural Steel v. Spannaus,* 438 U.S. 234, 244, 98 S.Ct. 2716, 57 L.Ed.2d 727 (1978)). "The severity of the impairment measures the height of the hurdle the state legislation must clear." *Allied Structural Steel,* 438 U.S. at 245, 98 S.Ct. 2716. The more severe the impairment, the more searching the examination of the legislation must be. *Id.*

In determining the extent of the impairment, a court must consider "whether the industry the complaining party has entered has been regulated in the past." *Energy Reserves,* 459 U.S. at 411, 103 S.Ct. 697. If the industry has been heavily regulated, then the impairment is less severe because " '[o]ne whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them.' " *Id.* (quoting *Hudson County Water Co. v. McCarter,* 209 U.S. 349, 357, 28 S.Ct. 529, 52 L.Ed. 828 (1908)).

Even if a state regulation does constitute a substantial impairment of contract, it is still constitutional if the

state has a "significant and legitimate public purpose behind the regulation." *Energy Reserves,* 459 U.S. at 411-12, 103 S.Ct. 697. The regulation need not be addressed to an emergency or temporary situation. *Id.* at 412, 103 S.Ct. 697.

Once a legitimate public purpose has been identified, the final step of the Contracts Clause analysis is to determine "whether the adjustment of 'the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption.'" *Energy Reserves,* 459 U.S. at 412, 103 S.Ct. 697 (quoting *United States Trust Co. v. New Jersey,* 431 U.S. 1, 22, 97 S.Ct. 1505, 52 L.Ed.2d 92 (1977) (alterations in the original)). Unless the state is a party to the contract, courts " 'defer to legislative judgment as to the necessity and reasonableness of a particular measure.'" *Id.* at 412-13, 103 S.Ct. 697 (quoting *United States Trust,* 431 U.S. at 22-23, 97 S.Ct. 1505); *see also Seltzer v. Cochrane (In re Seltzer),* 104 F.3d 234, 236 (9th Cir. 1996).

Section 340.9 substantially impairs contracts between insurers and insured. It revives claims that would otherwise be barred by the contractual limitations period included in most insurance contracts pursuant to § 2071. It subjects the insurers to potential liability that they believed had long since been put to rest. The severity of the impairment is significantly mitigated, however, by the fact that the California insurance industry is heavily regulated. *See Calfarm,* 258 Cal.Rptr. 161, 771 P.2d at 1262 (holding that the insurance industry is a highly-regulated industry in which further regulation can reasonably be anticipated).

This particular impairment is also less severe because the limitations period in the contracts is mandated by statute. Section 2071 requires all insurance policies that contain fire coverage to include a provision giving the insured one year from the inception of the loss to bring any claim under the contract. The provisions were not bargained for and are subject to an existing statute; therefore, impairment of these provisions is less severe.

Given the highly-regulated nature of the California insurance industry and the statutory underpinnings of the contractual limitations clause, § 340.9's interference with contracts, while substantial, is not so severe as to render the statute unconstitutional.

Although § 340.9 substantially impairs contracts, it was passed for a legitimate public purpose. Section 340.9 was introduced as Senate Bill No. 1899 "to bring needed relief to the victims of the Northridge earthquake." Sen. Comm. on Judiciary, Analysis of Sen. Bill. No. 1899 (1999-2000); *see also Hellinger,* 111 Cal.Rptr.2d at 275. The bill's author believed that the one-year limitations period had barred victims from being fairly compensated after they had been misled about the extent of their losses. *See id.* at 275. Protecting the rights of victims of the Northridge earthquake is a significant and legitimate public purpose.

Allstate argues that § 340.9 no longer serves any legitimate state purpose after the California Supreme Court's decision in *Vu,* 113 Cal.Rptr.2d 70, 33 P.3d at 493-94. It contends that the doctrine of equitable estoppel, as clarified in *Vu,* fully protects victims of the Northridge earthquake; therefore, that the purpose behind § 340.9 has been made obsolete.

Although *Vu* does provide some protection for victims of the Northridge earthquake, its protection is not as complete as that of § 340.9. As demonstrated by this case, not all insureds will be able to take advantage of the *Vu* holding, even if they are alleging significant malfeasance on the part of the insurer. Section 340.9 eliminates the need for an insured to present any evidence of the misrepresentations that are a base requirement for equitable estoppel under *Vu* and protects all insureds who were not fully compensated for their losses, so long as they meet the requirements of § 340.9. *Vu* clearly reduced the need for § 340.9, but we cannot say that it entirely eliminated it. Despite that decision, § 340.9 is still based on a legitimate public purpose. Moreover, § 340.9 also protects a larger class of homeowners than those that would benefit from *Vu,* namely, those who contacted their insurers about earthquake damage by January 1, 2000, whereas *Vu* applies only to homeowners who had filed claims.

Finally, § 340.9 is "of a character appropriate to the public purpose justifying [the legislation's] adoption." *Energy Reserves,* 459 U.S. at 412, 103 S.Ct. 697. Although § 340.9 is undeniably broad in its scope, reviving Northridge earthquake claims regardless of whether the insurance company has been shown to have acted wrongly, it is not so broad as to be unconstitutional. Despite its breadth, § 340.9 is not without limits. Section 340.9 revives only claims that resulted from the Northridge earthquake, a one-time event with a discrete, albeit large, number of victims. Additionally, only plaintiffs who had contacted an insurer prior to January 1, 2000, have their claims revived. § 340.9(b). This helps to exclude fraudulent claims that were invented just to take advantage of § 340.9's

passage. Nor are insurance companies subjected to ongoing liability, because the claims were revived for only one year. Given the substantial deference given to legislative judgment as to the necessity and reasonableness of economic statutes, § 340.9 is "of a character appropriate to the public purpose justifying [the legislation's] adoption." *Energy Reserves,* 459 U.S. at 412, 103 S.Ct. 697.

Given the highly-regulated nature of the insurance industry in California and the relatively moderate level of impairment of contract, the legitimate public purpose of the statute, and the reasonableness of the scope of the statute in carrying out its public purpose, we hold that § 340.9 does not violate the contract clause of either the federal or California Constitutions.

D. *Due Process*

Allstate also contends that § 340.9 violates the due process clauses of both the federal and California Constitutions by retroactively impairing vested contractual rights. Under the federal Constitution, retrospective economic legislation must only pass rational basis review: the statute must be based on "a legitimate legislative purpose furthered by rational means." *Gen. Motors Corp. v. Romein,* 503 U.S. 181, 191, 112 S.Ct. 1105, 117 L.Ed.2d 328 (1992). For the reasons discussed above, § 340.9 passes this test.

Allstate argues that the result is different under California's due process clause because the California Supreme Court has prohibited the revival of expired claims in *Chambers v. Gallagher,* 177 Cal. 704, 171 P. 931 (1918). In *Chambers,* the California Supreme Court held that a statute that removed the statute of limitations

defense in proceedings to enforce payment of inheritance taxes was unconstitutional. *Id.* at 933. *Chambers,* however, has since been limited in its application. In *People v. Frazer,* 21 Cal.4th 737, 88 Cal.Rptr.2d 312, 982 P.2d 180, 205 n. 32 (1999), the California Supreme Court refused to declare a revival statute unconstitutional based on *Chambers.* The court noted that *Chambers* had not been used by any court to strike down a statute in a civil case not involving some form of tax dispute. *Id.* This effectively limits *Chambers'* holding to tax cases. This is not a tax case; therefore, *Chambers* is not controlling. If § 340.9 passes the normal due process test for retroactive application of a statute under the California Constitution, then it is constitutional.

Under the California Constitution, a statute can only be applied retroactively to impair vested rights if retroactive application "'reasonably could be believed to be sufficiently necessary to the public welfare as to justify the impairment.'" *In re Marriage of Bouquet,* 16 Cal.3d 583, 128 Cal.Rptr. 427, 546 P.2d 1371, 1376 (1976) (quoting *Addison v. Addison,* 62 Cal.2d 558, 43 Cal.Rptr. 97, 399 P.2d 897, 902 (1965)). In determining whether a retroactive law violates the California due process clause, California courts consider: (1) the significance of the state interest served by the law; (2) the importance of retroactive application of the law to the effectuation of the interest; (3) the extent and legitimacy of the reliance on the former law; (4) the extent of actions taken on the basis of that reliance; and (5) the extent to which the retroactive application of the new law would disrupt those actions. *Id.*

Applying these factors demonstrates that § 340.9 "reasonably could be believed to be sufficiently necessary to the public welfare as to justify the impairment." *Id.* The

statute was passed to serve the significant state interest of ensuring that those injured by the Northridge earthquake are fully compensated for their losses. The California legislature determined that the claims procedures employed after the Northridge earthquake were not fair to all homeowners. The retroactive application of § 340.9 was essential to protecting the rights of those injured by the earthquake because most, if not all, of their claims were barred by the statutorily-imposed contractual limitations clause. Allstate, and other insurers, could not legitimately rely to any great extent on the one-year limitations period because it was mandated by statute and the insurance industry as a whole is heavily regulated. Finally, although § 340.9 significantly disrupts the insurer's actions, the legislature could have reasonably believed that § 340.9 was necessary to the public welfare because of the magnitude of the harm caused by the earthquake and the perceived problems of insurer malfeasance.

We conclude that § 340.9 does not violate the due process clause of the federal or California Constitutions.

CONCLUSION

The judgments of the district court dismissing the Homeowners' claims are reversed and the cases remanded to the district court for further proceedings consistent with this opinion.

REVERSED and REMANDED.

119 F.Supp.2d 1073

Vito CAMPANELLI, et al., Plaintiffs,

v.

ALLSTATE INSURANCE COMPANY, et al., Defendants.

No. CV 98-7185 RJK.

United States District Court,
C.D. California.

Oct. 17, 2000.

Norman J. Watkins, Ruth Segal, Stephen M. Harber, Los Angeles, CA, for plaintiffs.

Peter H. Klee, Angela J. Hansen, Nathan S. Arrington, William Grant Peterson, Luce Forward Hamilton & Scripps, San Diego, CA, for defendant.

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AGAINST PLAINTIFFS WILLIAM AND TERRY NOAH

KELLEHER, District Judge.

On August 24, 2000, Defendant Allstate Insurance Company ("Allstate") filed a motion for summary judgment against Plaintiffs William and Terry Noah (collectively, "the Noahs"). The Noahs opposed the motion. The Court heard oral argument on October 16, 2000 and, having considered the papers, pleadings, and records on file herein, the Court *grants* Allstate's motion for summary judgment in its entirety.

BACKGROUND FACTS

The following facts are not disputed. The Noahs are Allstate policyholders. They suffered property damage to their home as a result of the 1994 Northridge earthquake. The Noahs reported a claim to Allstate on January 13, 1995.

Allstate resolved their claim under their homeowners' policy and closed the claims file by letter dated August 21, 1996. In this letter, Allstate informed the Noahs that their insurance policy contained a one-year limitations provision that required them to bring any lawsuit within one year of the date of their loss.

On September 6, 1996, Allstate made an additional payment to the Noahs for the loss of kitchen facilities during the repairs to their home. Allstate again notified the Noahs that Allstate had concluded their claim and that their insurance policy contained a one-year limitations provision that required them to bring any lawsuit within one year of the date of their loss.[1]

On May 4, 1998, the Noahs joined 28 other plaintiffs (collectively, "Plaintiffs") in the instant suit against Allstate and Allstate's contractors alleging fraud in the

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[1] Both the August 21, 1996 and September 6, 1996 letters state as follows:

> Both your Allstate policy and California law provide you up to one year to present and pursue a claim under your policy for damages to your home and its contents. Within this one year period you must take reasonable steps to identify any damage your home or its contents may have suffered in the earthquake, and promptly report the damage to us.

Lodgment of Exhibits, Exhs. 7, 10.

adjustment of claims following the earthquake. Plaintiffs allege that the engineers employed by Defendant Shadowbrook, an engineering company retained by Allstate to help with claims investigations, were unlicensed. In addition, some of the engineering reports from Shadowbrook were allegedly ghostwritten by Defendant Western States. As a result, Plaintiffs contend that they settled their claims for less than they were worth. Both Shadowbrook and Western States defaulted. Allstate is the sole remaining defendant.

Plaintiffs specifically allege claims for:

(1) RICO violations, 18 U.S.C. §§ 1961-1968;

(2) Negligence;

(3) Negligent Misrepresentation;

(4) Intentional Misrepresentation;

(5) Breach of the Covenant of Good Faith and Fair Dealing; and

(6) Breach of Contract

Allstate moves for summary judgment limited to the Noahs, arguing that their claims for relief are time-barred under the Allstate policy and California law.

STANDARD

Summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). A fact is material only if it is relevant to

a claim or defense and its existence might affect the suit's outcome. *See T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Assoc.,* 809 F.2d 626, 630 (9th Cir.1987). The court must view the facts and draw inferences in the manner most favorable to the non-moving party. *See Chaffin v. United States,* 176 F.3d 1208, 1213 (9th Cir.1999).

The moving party bears the burden of demonstrating the absence of a genuine issue of material fact for trial. *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 256, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). "[T]he burden on the moving party may be discharged by 'showing' – that is, pointing out to the district court – that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett,* 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *see Musick v. Burke,* 913 F.2d 1390, 1394 (9th Cir.1990). To demonstrate that the non-moving party has no evidence, the moving party must affirmatively show the absence of such evidence in the record, either by deposition testimony, the inadequacy of documentary evidence or by any other form of admissible evidence. *See Celotex,* 477 U.S. at 322, 106 S.Ct. 2548. The moving party has no burden to negate or disprove matters on which the opponent will have the burden of proof at trial. *See id.* at 325, 106 S.Ct. 2548.

A non-moving party's allegation that factual disputes persist between the parties will not automatically defeat an otherwise properly supported motion for summary judgment. *See* Fed.R.Civ.P. 56(e) (non-moving party "may not rest upon the mere allegations or denials of the adverse party's pleadings, but . . . must set forth specific facts showing that there is a genuine issue for trial."). "[A] mere 'scintilla' of evidence will be insufficient to defeat a properly supported motion for summary judgment; instead,

the nonmoving party must introduce some 'significant probative evidence tending to support the complaint.'" *Fazio v. City and County of San Francisco,* 125 F.3d 1328, 1331 (9th Cir.1997), quoting *Anderson,* 477 U.S. at 249, 252, 106 S.Ct. 2505. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

DISCUSSION

A. *The Noahs' Claims Are Barred By The Statute Of Limitations.*

Under this Court's previous rulings in this case, the one-year limitations period contained in the Noahs' insurance polices [sic] as well as in California Insurance Code Section 2071 governs the Noahs' state as well as RICO claims. *See Campanelli v. Allstate Ins. Co.,* 85 F.Supp.2d 980, 984 (C.D.Cal.2000) (Kelleher, J.) ("[t]he [Plaintiffs'] lawsuit for bad faith, tortious conduct, and breach of contract emanates from the policy itself. The lawsuit seeks redress for damages caused by Allstate's conduct during the adjustment of the [Plaintiffs'] property damage claim. Accordingly, the [Plaintiffs'] action is 'on the policy,' and therefore subject to the one-year time bar."); *Campanelli v. Allstate Ins. Co.,* 97 F.Supp.2d 1211, 1214 (C.D.Cal.2000) (Kelleher, J.) ("Despite RICO's inherent four-year limitations period, a one-year time bar applies to the RICO claim in this case. The contract of insurance between Allstate and [Plaintiffs] specifically provides for a one-year time bar. . . . Since Allstate and the [Plaintiffs] contracted for a 'reasonable' limitations period under California law, any claim arising under that policy would be measured against the one-year time bar. . . . [A]ll of the Plaintiffs' claims –

including the RICO claim – arise out of their respective policies of insurance.").

Although the dates and times differ slightly as to the Noahs' claims, the legal analysis and resulting conclusion are identical to those of the other *Campanelli v. Allstate* plaintiffs – namely, plaintiffs Cheryl Mondheim, James and Pat House, and George and Mary Lou Giakoumakis – against whom this Court granted summary judgment under the applicable one-year statute of limitations. Summary judgment is therefore appropriate as to the Noahs.

B. *The Noahs' Reliance On Senate Bill 1899 Is Premature.*

The Noahs argue that their claims are not consigned to the same fate as that of Ms. Mondheim, the Houses, and the Giakoumakises, because of the enactment of Senate Bill 1899 ("SB 1899").

On September 30, 2000, Governor Gray Davis signed legislation enacting SB 1899, which adds Section 340.9 to the California Code of Civil Procedure and provides, in pertinent part:

> Notwithstanding any other provision of law or contract, any insurance claim for damages arising out of the Northridge earthquake of 1994 which is barred as of the effective date of this section solely because the applicable statute of limitations has or had expired is hereby revived and a cause of action thereon may be commenced provided that the action is commenced within one year of the effective date of this section.

Cal. Civ. Proc. § 340.9(a).

Most notably, however, SB 1899 does not apply to claims that have been "litigated to finality in any court of competent jurisdiction" before the effective date of SB 1899, or to any written compromised settlement agreements entered into between an insurer and its insured where the insured was represented by counsel. Cal. Civ. Proc. §§ 340.9(d)(1) & (2).

SB 1899 does not become effective until January 1, 2001. Meanwhile, the Noahs' claims are subject to summary judgment based on the expiration of the statute of limitations. Summary judgment constitutes a final adjudication on the merits. *See, e.g., Rand v. Rowland,* 154 F.3d 952, 957 (9th Cir.1998) ("[A] grant of summary judgment is a final adjudication on the merits.") (citing *Griffith v. Wainwright,* 772 F.2d 822, 825 n. 4 (11th Cir.1985) and 18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure:* Jurisdiction Section 4444 (1981)). Having been litigated to finality in a court of competent jurisdiction before the effective date of SB 1899, the Noahs' claims cannot be revived by SB 1899.

DISPOSITION

Allstate's Motion For Summary Judgment Against Plaintiffs William and Terry Noah is GRANTED.

IT IS FURTHER ORDERED that counsel for Allstate submit a Judgment to this effect in accordance with the Local Rules.

IT IS SO ORDERED.

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97 F.Supp.2d 1211

Vito CAMPANELLI; et al., Plaintiffs,

v.

ALLSTATE INSURANCE COMPANY; et al., Defendants.

No. CV 98-7185 RJK.

United States District Court,
C.D. California.

May 15, 2000.

Luce, Forward, Hamilton & Scripps by Peter Klee, Nathan S. Arrington, Angela Hansen, Seth Friedman, Jeffrey Commisso, San Diego, CA, for Allstate.

ORDER GRANTING DEFENDANT ALLSTATE INSURANCE COMPANY'S MOTION FOR SUMMARY JUDGMENT AGAINST PLAINTIFFS GEORGE AND MARY LOU GIAKOUMAKIS

KELLEHER, District Judge.

Defendant Allstate Insurance Company ("Allstate") filed the instant motion for summary judgment against Plaintiffs George and Mary Lou Giakoumakis (together, the "Giakoumakises") on April 17, 2000. Because the parties adequately represent their positions in their moving and opposing papers, the Court waives oral argument. *See* C.D. Local R. 7.11. Having considered the parties' briefs and declarations, the Court now ***grants*** Allstate's motion for summary judgment.

FACTUAL BACKGROUND

The following facts are not disputed. Plaintiffs George and Mary Lou Giakoumakis (together, the

"Giakoumakises") are Allstate policyholders. They suffered property damage to their home in Woodland Hills, California as a result of the 1994 Northridge earthquake. The Giakoumakises reported a claim to Allstate on January 19, 1994.

Allstate resolved their claim under their homeowners' policy and closed the claims file by letter dated August 16, 1994. The Giakoumakises objected to Allstate's low settlement and challenged Allstate's inspection. Allstate conducted further inspections, and wrote two additional checks to the Giakoumakises on June 14 and July 21, 1995. In September 1995, the Giakoumakises complained further, but Allstate responded that they had been compensated fully for their loss.

Allstate's June 14, 1995 letter informed the Giakoumakises that any further damage claims had to be filed within one year of the letter's date.

> Both your Allstate policy and California law provide you up to one year to present and pursue a claim under your policy for damages to your home and its contents. Within this one year period you must take reasonable steps to identify any damage your home or its contents may have suffered in the earthquake, and promptly report the damage to us.

Lodgment of Exhibits, Ex. 5 (April 17, 2000).

On September 2, 1998, the Giakoumakises, joined with 28 other plaintiffs, brought this suit against Allstate and Allstate's contractors alleging irregularities in the adjustment of claims following the earthquake. Plaintiffs allege that the engineers employed by Defendant Shadowbrook, an engineering company retained by Allstate to

help with claims investigations, were unlicensed. In addition, some of the engineering reports from Shadowbrook were allegedly ghostwritten by Defendant Western States. As a result, Plaintiffs contend that they settled their claims for less than they were worth. Both Shadowbrook and Western States defaulted. Allstate is the sole remaining defendant.

Plaintiffs specifically allege claims for:

(1) RICO violations, 18 U.S.C. §§ 1961-1968;

(2) Negligence;

(3) Negligent Misrepresentation;

(4) Intentional Misrepresentation;

(5) Breach of the Covenant of Good Faith and Fair Dealing; and

(6) Breach of Contract.

Allstate moves for summary judgment against the Giakoumakises only, arguing that their claims are time-barred under the Allstate policy and California law.

STANDARD

Summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). A fact is material only if it is relevant to a claim or defense and its existence might affect the suit's outcome. *See T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Assoc.,* 809 F.2d 626, 630 (9th Cir.1987). The court

must view the facts and draw inferences in the manner most favorable to the non-moving party. *See Chaffin v. United States,* 176 F.3d 1208, 1213 (9th Cir.1999).

The moving party bears the burden of demonstrating the absence of a genuine issue of material fact for trial. *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 256, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). [T]he burden on the moving party may be discharged by "'showing' – that is, pointing out to the district court – that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett,* 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *see Musick v. Burke,* 913 F.2d 1390, 1394 (9th Cir.1990). To demonstrate that the non-moving party has no evidence, the moving party must affirmatively show the absence of such evidence in the record, either by deposition testimony, the inadequacy of documentary evidence or by any other form of admissible evidence. *See Celotex,* 477 U.S. at 322, 106 S.Ct. 2548. The moving party has no burden to negate or disprove matters on which the opponent will have the burden of proof at trial. *See id.* at 325, 106 S.Ct. 2548.

A non-moving party's allegation that factual disputes persist between the parties will not automatically defeat an otherwise properly supported motion for summary judgment. *See* Fed.R.Civ.P. 56(e) (non-moving party "may not rest upon the mere allegations or denials of the adverse party's pleadings, but . . . must set forth specific facts showing that there is a genuine issue for trial."). "[A] mere 'scintilla' of evidence will be insufficient to defeat a properly supported motion for summary judgment; instead, the nonmoving party must introduce some 'significant probative evidence tending to support the complaint.'" *Fazio v. City and County of San Francisco,* 125

F.3d 1328, 1331 (9th Cir.1997), *quoting Anderson,* 477 U.S. at 249, 252, 106 S.Ct. 2505.

DISCUSSION

This Court resolved a nearly identical motion for summary judgment earlier this year. *See Campanelli v. Allstate Ins. Co.,* 85 F.Supp.2d 980, 984 (C.D.Cal.2000) (Kelleher, J.). In that decision, the Court held – with respect to different plaintiffs, James and Pat House – that the claims against Allstate were time-barred. *See id.* at 984. The dates and times of the Houses' claims differ slightly from the Giakoumakises' claims, but the legal analysis and resulting conclusion is the same. Summary judgment is therefore appropriate.

The Court takes this opportunity to expand upon one issue resolved implicitly, though not explicitly, in its published order in the Houses' case. That order did not explain why the one-year time-bar contained in the Plaintiffs' policies, and in Cal.Ins.Code § 2071, applies to the Plaintiffs' RICO claim, when federal courts have interpreted RICO to contain a four-year statute of limitations. *See Agency Holding Corp. v. Malley-Duff & Assoc., Inc.,* 483 U.S. 143, 156, 107 S.Ct. 2759, 97 L.Ed.2d 121 (1987) (implying a four-year limitations period by analogy to the Clayton Act). The Supreme Court recently reaffirmed that RICO's limitations period is four years and clarified when that time period begins to run. *See Rotella v. Wood,* ___ U.S. ___, ___-___, 120 S.Ct. 1075, 1079-80, 145 L.Ed.2d 1047 (2000).

Despite RICO's inherent four-year limitations period, a one-year time bar applies to the RICO claim in this case. The contract of insurance between Allstate and the

Giakoumakises specifically provides for a one-year time bar. Under California law, parties may contract for a specific limitation-on-claims period:

> California permits contracting parties to agree upon a shorter limitations period for bringing an action than that prescribed by statute, so long as the time allowed is reasonable. A contractual limitation period requiring a plaintiff to commence an action within 12 months following the event giving rise to a claim is a reasonable limitation which generally manifests no undue advantage and no unfairness.

Han v. Mobil Oil Corp., 73 F.3d 872, 877 (9th Cir.1995) (internal citations to California cases omitted).

Since Allstate and the Giakoumakises contracted for a "reasonable" limitations period under California law, any claim arising under that policy would be measured against the one-year time bar. As this Court held in the Houses' case, all of the Plaintiffs' claims – including the RICO claim – arise out of their respective policies of insurance. *See Campanelli,* 85 F.Supp.2d at 984. Accordingly, the Court must apply the one-year time bar to the RICO claim.

Preemption doctrine does not require a contrary conclusion. The Court acknowledges that the contractual limitations period is essentially a creature of state law, since § 2071 requires the inclusion of a one-year limitations period in every California homeowners' policy. Viewed as a state law provision, rather than a contractual provision, the one-year time-bar could, in theory, be preempted by federal RICO's four-year limitations period. In actuality, however, the preemption argument works

against the application of the four-year RICO limitations period.

Most federal laws that interfere with state regulation of insurance are superseded by operation of the federal McCarran-Ferguson Act. *See* 15 U.S.C. § 1012(b) ("No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance"). In effect, the McCarran-Ferguson Act provides for "reverse preemption," whereby state insurance laws trump inconsistent federal provisions.

The Supreme Court has considered McCarran-Ferguson reverse preemption in the RICO context:

> The McCarran-Ferguson Act [] precludes application of a federal statute in face of state law "enacted ... for the purpose of regulating the business of insurance," if the federal measure does not "specifically relat[e] to the business of insurance," and would "invalidate, impair, or supersede" the State's law. RICO is not a law that "specifically relates to the business of insurance." This case therefore turns on the question: Would RICO's application to the employee beneficiaries' claims at issue "invalidate, impair, or supersede" Nevada's laws regulating insurance?

Humana, Inc. v. Forsyth, 525 U.S. 299, 307, 119 S.Ct. 710, 142 L.Ed.2d 753 (1999) (internal cite omitted).

California law requires Allstate to provide a one-year claims limitation period in its insurance policies. Yet federal law establishes a four-year period for RICO claims.

State and federal law cannot be reconciled on this point. In the face of this inconsistency, *Humana* suggests that state law prevails.

Applying the four-year RICO time-bar in the Giakoumakises' case would result in the "invalidation" and "impairment" of California's mandatory one-year limitations period for suing an insurer under an insurance policy. California law requires the one-year limit to be placed in every homeowners' policy sold in California. California courts regularly apply the bar to prevent stale claims against insurers. California thus has a strong policy preferring the application of the one-year limit, rather than the four-year RICO limit. Consequently, the one-year time-bar in § 2071 preempts the RICO four-year statute of limitations.

DISPOSITION

The Court ***grants*** Allstate's motion for summary judgment against Plaintiffs George and Mary Lou Giakoumakis.

IT IS SO ORDERED.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

VITO CAMPANELLI; et al. Plaintiffs, v. ALLSTATE INSURANCE CO.; et al. Defendants.	Case No. CV 98-7185 RJK **ORDER GRANTING DEFENDANT ALLSTATE INSURANCE CO.'S MOTION FOR SUMMARY JUDGMENT AGAINST PLAINTIFF CHERYL MONDHEIM** (Filed Feb. 8, 2000)

Defendant Allstate Insurance Company ("Allstate") filed the instant motion for summary judgment against Plaintiff Cheryl Mondheim ("Mondheim") on September 20, 1999.[1] The Court heard oral argument on October 25, 1999. Following argument, the Court took the matter under submission. Having considered the parties' briefs and declarations, and the contentions of counsel, the Court now *grants* Allstate's motion for summary judgment.

FACTUAL BACKGROUND

Mondheim is an Allstate policyholder. On January 17, 1994, the Northridge earthquake shook the Los Angeles area, damaging many buildings, homes, and structures, including Mondheim's home in Chatsworth, California.

[1] Mondheim is one of more than 25 Plaintiffs who filed suit against Allstate regarding its adjustment of property damage claims in the aftermath of the January 1994 Northridge earthquake.

Following the earthquake, on January 18, 1994, Mondheim submitted a claim for property damage to Allstate.

Allstate paid Mondheim $220,101.51 for her claim on November 18, 1994. Following an additional inspection, Allstate paid Mondheim another $32,241.87 for her claim of damages. Then on January 24, 1996, Mondheim demanded that Allstate reopen her claim to pay for the cost of cleaning her pool. Allstate agreed to pay Mondheim $1025.00 on February 14, 1996.

Allstate closed Mondheim's claim by letter dated February 22, 1996. The letter stated that any further damage claims had to be filed within one year of the letter's date.

> Both your Allstate policy and California law provide you up to one year to present and pursue a claim under your policy for damages to your home and its contents. Within this one year period you must take reasonable steps to identify any damage your home or its contents may have suffered in the earthquake, and promptly report the damage to us.

Declaration of Mary DiNapoli ¶ 10, Lodgment of Exhibits, Ex. 8 (September 20, 1999).

On September 2, 1998, Mondheim joined in the instant suit against Allstate and Allstate's contractors alleging irregularities in the adjustment of claims following the earthquake. Plaintiffs allege that the engineers employed by Allstate contractors were unlicensed in California. These contractors allegedly employed false stamps in adjusting the Plaintiffs' property damage claims. Plaintiffs further allege that Allstate knew, or perhaps encouraged, these fraudulent adjusting practices.

As a result, Plaintiffs contend that they settled their claims for less than they were worth.

Plaintiffs specifically allege claims for:

(1) RICO violations, 18 U.S.C. §§ 1961-1968;

(2) Negligence;

(3) Negligent Misrepresentation;

(4) Intentional Misrepresentation;

(5) Breach of the Covenant of Good Faith and Fair Dealing; and

(6) Breach of Contract.

See Complaint ¶¶ 61-101 (September 2, 1998).

Allstate now moves for summary judgment against Mondheim, arguing that her claims for relief are time-barred under the Allstate policy and California law.

STANDARD

Summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A fact is material only if it is relevant to a claim or defense and its existence might affect the suit's outcome. *See T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Assoc.,* 809 F.2d 626, 630 (9th Cir. 1987). The court must view the facts and draw inferences in the manner most favorable to the non-moving party. *See Chaffin v. United States,* 176 F.3d 1208, 1213 (9th Cir. 1999). A court may not, on a motion for summary judgment, evaluate the

credibility of evidence. *See Leslie v. Grupo ICA,* 198 F.3d 1152, 1157-59 (9th Cir. 1999).

The moving party bears the burden of demonstrating the absence of a genuine issue of material fact for trial. *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 256 (1986). "[T]he burden on the moving party may be discharged by 'showing' – that is, pointing out to the district court – that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett,* 477 U.S. 317, 325 (1986); *see Musick v. Burke,* 913 F.2d 1390, 1394 (9th Cir. 1990). To demonstrate that the non-moving party has no evidence, the moving party must affirmatively show the absence of such evidence in the record, either by deposition testimony, the inadequacy of documentary evidence or by any other form of admissible evidence. *See Celotex,* 477 U.S. at 322. The moving party has no burden to negate or disprove matters on which the opponent will have the burden of proof at trial. *See id.* at 325.

A non-moving party's allegation that factual disputes persist between the parties will not automatically defeat an otherwise properly supported motion for summary judgment. *See* Fed. R. Civ. P. 56(e) (non-moving party "may not rest upon the mere allegations or denials of the adverse party's pleadings, but . . . must set forth specific facts showing that there is a genuine issue for trial."). "[A] mere 'scintilla' of evidence will be insufficient to defeat a properly supported motion for summary judgment; instead, the nonmoving party must introduce some 'significant probative evidence tending to support the complaint.'" *Fazio v. City and County of San Francisco,* 125 F.3d 1328, 1331 (9th Cir. 1997), *quoting Anderson,* 477 U.S. at 249, 252. If the adverse party does not so respond,

summary judgment, if appropriate, shall be entered against the adverse party.

DISCUSSION

A. The One-Year Limitations Period

In California, homeowners' insurance policies must contain the following provision:

> No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with, and unless commenced within 12 months next after inception of the loss.

Cal. Ins. Code § 2071 (West 1993). The Allstate policy held by Mondheim included this one-year limitations provision.

The California Supreme Court has defined the phrase *inception of the loss* to mean "that point in time when appreciable damage occurs and is or should be known to the insured, such that a reasonable insured would be aware that his notification duty under the policy has been triggered." *Prudential-LMI Comm. Ins. v. Superior Court,* 51 Cal.3d 674, 686-87 (1990).

Allstate argues that Mondheim's "loss" occurred during the January 17, 1994 Northridge earthquake, yet she did not file this lawsuit until September 2, 1998. Thus, Allstate contends that her claims for relief are barred by the one-year statute of limitations.

Mondheim disputes that her loss occurred on January 17, 1994. She argues that the timing of her loss may not be resolved by summary judgment because that inquiry

presents a factual issue for trial. *See id.* at 687 ("[d]etermining when appreciable damage occurs such that a reasonable insured would be on notice of a potentially insured loss is a factual matter for the trier of fact."). But Mondheim cannot avoid summary judgment in this instance because she has failed to muster *any* factual dispute regarding the date of their loss. Put simply, Mondheim has not introduced any evidence to controvert Allstate's evidence that the damage occurred on January 17, 1994.

Aside from the arguments of counsel – which may *not* be considered as evidence of disputed facts sufficient to avoid summary judgment – Mondheim has produced only a half-page "Statement of Genuine Issues." This document nowhere controverts Allstate's evidence that Mondheim's loss occurred on January 17, 1994. Plaintiffs may not maintain silence in the face of an affirmative burden to display a genuine dispute of material fact pertaining to the inception of the loss. *See* Fed. R. Civ. P. 56(e) (non-moving party "may not rest upon the mere allegations or denials of the adverse party's pleadings, but . . . must set forth specific facts showing that there is a genuine issue for trial."). Since Mondheim has failed to controvert Allstate's contention that her loss occurred January 17, 1994, the Court finds, for purposes of this motion, that the inception of the loss was January 17, 1994.

B. Tolling the One-Year Period During Allstate's Investigation

Although Mondheim's loss occurred in January 1994, the one-year time period did not expire in January 1995, because the limitations period was tolled while Allstate

investigated the claim. The California Supreme Court has loosened the otherwise strict operation of the one-year time bar to permit homeowners to toll the one-year period "from the time an insured gives notice of the damage to his insurer, pursuant to applicable policy notice provisions, until coverage is denied." *Id.* at 693. By tolling the one-year limit while the insurance company investigates an insured's claim, the insured avoids a penalty if the insurer engages in a lengthy investigation. As a practical matter, the one-year period begins to run from the date the insurer denies coverage or settles the claim.

In the case of Mondheim, the one-year period was tolled until February 22, 1996. On that date, Allstate informed Mondheim in writing that her claim had been resolved, and thus closed. Consequently, Mondheim had to file suit before February 22, 1997 to avoid the one-year time bar. Plaintiffs' lawsuit was filed on September 2, 1998, more than one year *after* the limitations period had lapsed.

C. Actions Brought Outside the Policy Terms are Exempt from the One-Year Limitations Provision

Mondheim suggests that her claims are exempt from the operation of the one-year time bar because her claims are not based upon violations of the policy terms. She claims that Allstate's fraudulent conduct occurred *subsequent* to Allstate's handling of the property damage claim.

California courts have distinguished actions brought "on the policy" from those not. Actions brought "on the policy" – for example, bad faith claims against an insurer for its failure to pay benefits – fall within the ambit of the one-year limitations period in § 2071. *See Velasquez v.*

Truck Ins. Exch., 1 Cal. App. 4th 712, 719 (1991) (applying the statute of limitations strictly "where the bad faith action is based on allegations relating to the handling of a claim or the manner in which it is processed."). In two instances, however, California courts determined that actions against an insurer fell "outside" the policy, thus precluding the insurer from asserting the statute of limitations as a defense. *See Frazier v. Metropolitan Life Ins. Co.*, 169 Cal. App. 3d 90 (1985); *Murphy v. Allstate Ins. Co.*, 83 Cal. App. 3d 38 (1978).

Mondheim attempts to fit her case within the narrow exceptions to the one-year statute of limitations carved out in *Frazier* and *Murphy*. But both cases are readily distinguishable.

In *Frazier*, a widow sued her husband's life insurance carrier for failure to pay certain death benefits resulting from the claim of an accidental death. The Court of Appeal affirmed the trial court's denial of the statute of limitations defense on the ground that the insurer had not yet completed its investigation into whether the insured's death was suicide. Since the investigation remained open, the limitations period remained tolled until the widow received word of an adverse decision upon which she could stake her bad faith claim.

> [A]s found by the trial judge, Mrs. Frazier's action does not commence until Metropolitan denies her claim on the ground of suicide. Prior to such time Mrs. Frazier has a right (so far as the policy limitation is concerned) to sit back and wait until denial of claim before urging bad faith. Because it is not until Metropolitan actually denies the claim on the ground of suicide that Mrs. Frazier can actually ascertain whether or not

> Metropolitan has acted in bad faith. So long as Metropolitan continues to tell Mrs. Frazier they are trying to uncover new evidence, they have not committed an ultimate act of bad faith, and Mrs. Frazier has a right to rely upon their assurances.

Frazier, 169 Cal. App. 3d at 103-104.

In contrast to *Frazier,* where the one-year limitations period remained tolled while the insurer completed its investigation, Mondheim received a letter from Allstate in February 1996 informing her that her claim was resolved. The letter indicated in no uncertain terms that she had one year from that date to file suit related to the handling of her property damage claim.

Murphy provides no better support for Mondheim's contentions. In *Murphy,* homeowners filed a claim with Allstate after suffering fire damage to their home and furniture. Allstate retained unlicensed contractors to fix the home and furniture. During the repair process, the contractors neglected to protect the home from the elements by leaving the roof exposed. In effect, the homeowners suffered a *second* loss because of the contractors' shoddy work. The Court of Appeal concluded that this second loss – caused by Allstate's contractors – was not covered under the homeowners' policy. *Murphy,* 83 Cal. App. 3d at 45-46.

Unlike the homeowners in *Murphy,* whose claims originated from a second loss subsequent to the initial loss that triggered insurance coverage, Mondheim suffered but a single loss. The Northridge earthquake damaged her home. She has not alleged that Allstate's contractors engaged in such shoddy workmanship that she incurred

additional losses beyond those caused by the earthquake. Rather, she merely alleges that Allstate deprived her (by hiring unlicensed contractors) of appropriate damages suffered during the Northridge earthquake.

This Court's narrow reading of *Frazier* and *Murphy* comports with the approach of later California courts. *See, e.g., CBS Broadcasting Inc. v. Fireman's Fund Ins. Co.,* 70 Cal. App. 4th 1075, 1086 (1999) (finding a "trend by the appellate courts to limit the exemption from the limitations clause set forth in *Murphy* and *Frazier* to the facts of those cases"). Another court in this District has suggested that *Frazier* and *Murphy* have been limited to their facts by later decisions. *See Bank of America Nat'l Trust & Savings Assoc. v. Allstate Ins. Co.,* 29 F. Supp. 2d 1129, 1133-34 (C.D. Cal. 1998) (Pregerson, J.). No California case has opined that the subtle distinctions crafted in *Frazier* and *Murphy* deserve expansion.

Mondheim's lawsuit for bad faith, tortious conduct, and breach of contract emanates from the policy itself. The lawsuit seeks redress for damages caused by Allstate's conduct during the adjustment of her property damage claim. Accordingly, Mondheim's lawsuit is "on the policy," and therefore subject to the one-year time bar. Since Mondheim's suit was not filed until more than two years after her property damage claim was settled by Allstate, her suit is time-barred.

D. Abstention

As a last-gasp measure, Plaintiff urges this Court to abstain from deciding this motion until the California Supreme Court resolves a closely related inquiry. *See Vu v. Prudential Property & Casualty Ins. Co.,* 172 F.3d 725 (9th

Cir. 1999) (certifying a question of law to the California Supreme Court). In January 1994, Vu recovered damages caused by the Northridge earthquake under his Prudential policy. Vu's policy contained a one-year claims limitation provision. In September 1995, Vu discovered *additional* damages that the Prudential adjuster had failed to locate during his inspection. Those additional damages were appraised at more than ten times the deductible on the policy. Vu filed a claim, but Prudential refused to pay citing the one-year time bar. Vu then brought suit; he argued that Allstate [sic] should be estopped from benefitting from the time bar, since he had relied upon Prudential to discover the full extent of earthquake damages back in 1994.

The *Vu* court concluded that California appellate courts had authored conflicting opinions interpreting the "inception of the loss" provision. Accordingly, the Ninth Circuit certified the following question to the Supreme Court of California:

> Where an insured presents a timely claim to his insurer for property damage under a policy, and the insurer's agent inspects the property but does not discover the full extent of covered damage, does California Insurance Code § 2071 bar a claim brought by the insured more than one year after the damage was sustained but within one year of his discovery of the additional damage? Or, to put the matter differently, does *Neff v. New York Life Ins. Co.*, 30 Cal. 2d 165, 180 P.2d 900 (1947), remain good law?

Vu, 172 F.3d at 727.

The California Supreme Court accepted the certified question. *See* Cal. S. Ct. Minutes (July 28, 1999), Case No.

S078271. The Supreme Court has not yet scheduled the matter for hearing.

This Court acknowledges that the California Supreme Court's eventual decision in *Vu* could touch upon the issue presented by Allstate's motion for summary judgment. Nevertheless, *Vu* appears distinguishable on the ground that the insured discovered additional damages at a later point in time following the initial adjustment and settlement. Mondheim does not allege later-discovered damages in her claims.

In any event – whether the *Vu* opinion would control the result or not – this Court is not prepared to wait upon the California Supreme Court. This Court has an obligation to decide the cases on its docket, resorting to abstention only in truly exceptional circumstances. *See County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188-189 (1959). Unlike the Ninth Circuit, this Court cannot certify questions of law to a state authority. *See* Cal. App. R. 29.5 ("The California Supreme Court may answer questions of law certified to it by the Supreme Court of the United States, a United States Court of Appeals, or the court of last resort of any state, territory, or commonwealth."). Thus, despite the minimal risk that *Vu* will alter the landscape of jurisprudence in California, the Court must rule now.

DISPOSITION

The Court ***grants*** Allstate's motion for summary judgment with respect to the claims brought by Plaintiff Cheryl Mondheim.

IT IS SO ORDERED.

DATED: February 8, 2000. /s/ Robert J. Kelleher
ROBERT J. KELLEHER
United States District
Judge

85 F.Supp.2d 980

Vito CAMPANELLI, et al., Plaintiffs,

v.

ALLSTATE INS. CO., et al., Defendants

No. CV 98-7185 RJK.

United States District Court,
C.D. California

Feb. 7, 2000.

Norman J. Watkins, Ruth Segal, Lynberg & Watkins, Los Angeles, CA, for Plaintiffs.

Peter H. Klee, Nathan S. Arrington, Luce Forward Hamilton & Scripps, San Diego, CA, for Defendants.

ORDER GRANTING DEFENDANT ALLSTATE INS. CO.'S MOTION FOR SUMMARY JUDGMENT AGAINST PLAINTIFFS JAMES & PAT HOUSE

KELLEHER, District Judge.

Defendant Allstate Insurance Company ("Allstate") filed the instant motion for summary judgment against Plaintiffs James and Pat House (together, the "Houses") on August 24, 1999.[1] The Court heard oral argument on October 4, 1999. Following argument, the Court took the matter under submission. Having considered the parties' briefs and declarations, and the contentions of counsel, the

[1] The Houses are two of more than 25 Plaintiffs who filed suit against Allstate regarding its adjustment of property damage claims in the aftermath of the January 1994 Northridge earthquake.

Court now ***grants*** Defendants' motion for summary judgment.

FACTUAL BACKGROUND

The Houses are Allstate policyholders. On January 17, 1994, the Northridge earthquake shook the Los Angeles area, damaging many buildings, homes, and structures, including the Houses' home in Woodland Hills, California. Following the earthquake, on January 20, 1994, the Houses submitted a claim for property damage to Allstate.

Allstate paid the Houses $106,287.20 for their claims on June 10, 1994. Following an additional inspection, Allstate paid the Houses another $11,827.51 for their claim of damages.

Allstate closed the Houses' claims by letter dated October 12, 1995. The letter stated that any further damage claims had to be filed within one year of the letter's date.

> Both your Allstate policy and California law provide you up to one year to present and pursue a claim under your policy for damages to your home and its contents. Within this one year period you must take reasonable steps to identify any damage your home or its contents may have suffered in the earthquake, and promptly report the damage to us.

Declaration of Mary DiNapoli, Ex. 4 (August 19, 1999).

On September 2, 1998, the Houses joined in the instant suit against Allstate and Allstate's contractors alleging irregularities in the adjustment of claims following the earthquake. Plaintiffs allege that the engineers

employed by Allstate contractors were unlicensed in California. These contractors allegedly employed false stamps in adjusting the Plaintiffs' property damage claims. Plaintiffs further allege that Allstate knew, or perhaps encouraged, these fraudulent adjusting practices. As a result, Plaintiffs contend that they settled their claims for less than they were worth.

Plaintiffs specifically allege claims for:

(1) RICO violations, 18 U.S.C. §§ 1961-1968;

(2) Negligence;

(3) Negligent Misrepresentation;

(4) Intentional Misrepresentation;

(5) Breach of the Covenant of Good Faith and Fair Dealing; and

(6) Breach of Contract.

See Complaint ¶¶ 61-101 (September 2, 1998).

Allstate now moves for summary judgment against the Houses, arguing that their claims for relief are time-barred under the Allstate policy and California law.

STANDARD

Summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). A fact is material only if it is relevant to a claim or defense and its existence might affect the suit's outcome. *See T.W. Elec. Serv., Inc. v. Pacific Elec.*

Contractors Assoc., 809 F.2d 626, 630 (9th Cir.1987). The court must view the facts and draw inferences in the manner most favorable to the non-moving party. *See Chaffin v. United States,* 176 F.3d 1208, 1213 (9th Cir.1999). A court may not, on a motion for summary judgment, evaluate the credibility of evidence. *See Leslie v. Grupo ICA,* 198 F.3d 1152, 1157-59 (9th Cir.1999).

The moving party bears the burden of demonstrating the absence of a genuine issue of material fact for trial. *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 256, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). "[T]he burden on the moving party may be discharged by 'showing' – that is, pointing out to the district court – that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett,* 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *see Musick v. Burke,* 913 F.2d 1390, 1394 (9th Cir.1990). To demonstrate that the non-moving party has no evidence, the moving party must affirmatively show the absence of such evidence in the record, either by deposition testimony, the inadequacy of documentary evidence or by any other form of admissible evidence. *See Celotex,* 477 U.S. at 322, 106 S.Ct. 2548. The moving party has no burden to negate or disprove matters on which the opponent will have the burden of proof at trial. *See id.* at 325, 106 S.Ct. 2548.

A non-moving party's allegation that factual disputes persist between the parties will not automatically defeat an otherwise properly supported motion for summary judgment. *See* Fed.R.Civ.P. 56(e) (non-moving party "may not rest upon the mere allegations or denials of the adverse party's pleadings, but . . . must set forth specific facts showing that there is a genuine issue for trial."). "[A] mere 'scintilla' of evidence will be insufficient to defeat a

properly supported motion for summary judgment; instead, the nonmoving party must introduce some 'significant probative evidence tending to support the complaint.'" *Fazio v. City and County of San Francisco,* 125 F.3d 1328, 1331 (9th Cir.1997), *quoting Anderson,* 477 U.S. at 249, 252, 106 S.Ct. 2505. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

DISCUSSION

A. The One-Year Limitations Period

In California, homeowners' insurance policies must contain the following provision:

> No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with, and unless commenced within 12 months next after inception of the loss.

Cal.Ins.Code § 2071 (West 1993). The Allstate policy held by the Houses included this one-year limitations provision.

The California Supreme Court has defined the phrase *inception of the loss* to mean "that point in time when appreciable damage occurs and is or should be known to the insured, such that a reasonable insured would be aware that his notification duty under the policy has been triggered." *Prudential-LMI Comm. Ins. v. Superior Court,* 51 Cal.3d 674, 686-87, 274 Cal.Rptr. 387, 798 P.2d 1230 (1990).

Allstate argues that the Houses' "loss" occurred during the January 17, 1994 Northridge earthquake, yet the

Houses did not file this lawsuit until September 2, 1998. Thus, Allstate contends that the Houses' claims for relief are barred by the one-year statute of limitations.

The Houses dispute that their loss occurred on January 17, 1994. The Houses argue that the timing of their loss may not be resolved by summary judgment because that inquiry presents a factual issue for trial. *See id.* at 687, 274 Cal.Rptr. 387, 798 P.2d 1230 ("[d]etermining when appreciable damage occurs such that a reasonable insured would be on notice of a potentially insured loss is a factual matter for the trier of fact."). But the Houses cannot avoid summary judgment in this instance because they have failed to muster *any* factual dispute regarding the date of their loss. Put simply, the Houses have not introduced any evidence to controvert Allstate's evidence that the damage occurred on January 17, 1994.

Aside from the arguments of counsel – which may *not* be considered as evidence of disputed facts sufficient to avoid summary judgment – the Houses have produced only a half-page "Statement of Genuine Issues." This document nowhere controverts Allstate's evidence that the Houses' loss occurred on January 17, 1994. Plaintiffs may not maintain silence in the face of an affirmative burden to display a genuine dispute of material fact pertaining to the inception of the loss. *See* Fed.R.Civ.P. 56(e) (non-moving party "may not rest upon the mere allegations or denials of the adverse party's pleadings, but . . . must set forth specific facts showing that there is a genuine issue for trial."). Since the Houses have failed to controvert Allstate's contention that their loss occurred January 17, 1994, the Court finds, for purposes of this motion, that the inception of the loss was January 17, 1994.

B. Tolling the One-Year Period During Allstate's Investigation

Although the Houses' loss occurred in January 1994, the one-year time period did not expire in January 1995, because the limitations period was tolled while Allstate investigated the claim. The California Supreme Court has loosened the otherwise strict operation of the one-year time bar to permit homeowners to toll the one-year period "from the time an insured gives notice of the damage to his insurer, pursuant to applicable policy notice provisions, until coverage is denied." *Id.* at 693, 274 Cal.Rptr. 387, 798 P.2d 1230. By tolling the one-year limit while the insurance company investigates an insured's claim, the insured avoids a penalty if the insurer engages in a lengthy investigation. As a practical matter, the one-year period begins to run from the date the insurer denies coverage or settles the claim.

In the case of the Houses, the one-year period was tolled until October 12, 1995. On that date, Allstate informed the Houses in writing that their claim had been resolved, and thus closed. Consequently, the Houses had to file suit before October 12, 1996 to avoid the one-year time bar. Plaintiffs' lawsuit was filed on September 2, 1998, almost two years *after* the one-year limitations period had lapsed.

C. Actions Brought Outside the Policy Terms are Exempt from the One-Year Limitations Provision

The Houses suggest that their claims are exempt from the operation of the one-year time bar because their claims are not based upon violations of the policy terms. The Houses claim that Allstate's fraudulent conduct occurred

subsequent to Allstate's handling of the property damage claim.

California courts have distinguished actions brought "on the policy" from those not. Actions brought "on the policy" – for example, bad faith claims against an insurer for its failure to pay benefits – fall within the ambit of the one-year limitations period in § 2071. *See Velasquez v. Truck Ins. Exch.,* 1 Cal.App.4th 712, 719, 5 Cal.Rptr.2d 1 (1991) (applying the statute of limitations strictly "where the bad faith action is based on allegations relating to the handling of a claim or the manner in which it is processed."). In two instances, however, California courts determined that actions against an insurer fell "outside" the policy, thus precluding the insurer from asserting the statute of limitations as a defense. *See Frazier v. Metropolitan Life Ins. Co.,* 169 Cal.App.3d 90, 214 Cal.Rptr. 883 (1985); *Murphy v. Allstate Ins. Co.,* 83 Cal.App.3d 38, 147 Cal.Rptr. 565 (1978).

The Houses attempt to fit their case within the narrow exceptions to the one-year statute of limitations carved out in *Frazier* and *Murphy.* But both cases are readily distinguishable.

In *Frazier,* a widow sued her husband's life insurance carrier for failure to pay certain death benefits resulting from the claim of an accidental death. The Court of Appeal affirmed the trial court's denial of the statute of limitations defense on the ground that the insurer had not yet completed its investigation into whether the insured's death was suicide. Since the investigation remained open, the limitations period remained tolled until the widow received word of an adverse decision upon which she could stake her bad faith claim.

> [A]s found by the trial judge, Mrs. Frazier's action does not commence until Metropolitan denies her claim on the ground of suicide. Prior to such time Mrs. Frazier has a right (so far as the policy limitation is concerned) to sit back and wait until denial of claim before urging bad faith. Because it is not until Metropolitan actually denies the claim on the ground of suicide that Mrs. Frazier can actually ascertain whether or not Metropolitan has acted in bad faith. So long as Metropolitan continues to tell Mrs. Frazier they are trying to uncover new evidence, they have not committed an ultimate act of bad faith, and Mrs. Frazier has a right to rely upon their assurances.

Frazier, 169 Cal.App.3d at 103-104, 214 Cal.Rptr. 883.

In contrast to *Frazier,* where the one-year limitations period remained tolled while the insurer completed its investigation, the Houses received a letter from Allstate in October 1995 informing them that their claim was resolved. The letter indicated in no uncertain terms that the Houses had one year from that date to file suit related to the handling of the property damage claim.

Murphy provides no better support for Plaintiffs' contentions. In *Murphy,* homeowners filed a claim with Allstate after suffering fire damage to their home and furniture. Allstate retained unlicensed contractors to fix the home and furniture. During the repair process, the contractors neglected to protect the home from the elements by leaving the roof exposed. In effect, the homeowners suffered a *second* loss because of the contractors' shoddy work. The Court of Appeal concluded that this second loss – caused by Allstate's contractors – was not

covered under the homeowners' policy. *Murphy,* 83 Cal.App.3d at 45-46, 147 Cal.Rptr. 565.

Unlike the homeowners in *Murphy,* whose claims originated from a second loss subsequent to the initial loss that triggered insurance coverage, the Houses suffered but a single loss. The Northridge earthquake damaged the Houses' home. The Houses have not alleged that Allstate's contractors engaged in such shoddy workmanship that the Houses incurred additional losses beyond those caused by the earthquake. The Houses merely allege that Allstate deprived them (by hiring unlicensed contractors) of appropriate damages suffered during the Northridge earthquake.

This Court's narrow reading of *Frazier* and *Murphy* comports with the approach of later California courts. *See, e.g., CBS Broadcasting Inc. v. Fireman's Fund Ins. Co.,* 70 Cal.App.4th 1075, 1086, 83 Cal.Rptr.2d 197 (1999) (finding a "trend by the appellate courts to limit the exemption from the limitations clause set forth in *Murphy* and *Frazier* to the facts of those cases"). Another court in this District has suggested that *Frazier* and *Murphy* have been limited to their facts by later decisions. *See Bank of America Nat'l Trust & Savings Assoc. v. Allstate Ins. Co.,* 29 F.Supp.2d 1129, 1133-34 (C.D.Cal.1998) (Pregerson, J.). No California case has opined that the subtle distinctions crafted in *Frazier* and *Murphy* deserve expansion.

The Houses' lawsuit for bad faith, tortious conduct, and breach of contract emanates from the policy itself. The lawsuit seeks redress for damages caused by Allstate's conduct during the adjustment of the Houses' property damage claim. Accordingly, the Houses' action is "on the policy," and therefore subject to the one-year time bar.

Since the Houses' suit was not filed until more than two years after their property damage claim was settled by Allstate, the Houses' suit is time-barred.

D. Abstention

As a last-gasp measure, the Plaintiffs urge this Court to abstain from deciding this motion until the California Supreme Court resolves a closely related inquiry. *See Vu v. Prudential Property & Casualty Ins. Co.,* 172 F.3d 725 (9th Cir.1999) (certifying a question of law to the California Supreme Court). In January 1994, Vu recovered damages caused by the Northridge earthquake under his Prudential policy. Vu's policy contained a one-year claims limitation provision. In September 1995, Vu discovered *additional* damages that the Prudential adjuster had failed to locate during his inspection. Those additional damages were appraised at more than ten times the deductible on the policy. Vu filed a claim, but Prudential refused to pay citing the one-year time bar. Vu then brought suit; he argued that Allstate [sic] should be estopped from benefitting from the time bar, since he had relied upon Prudential to discover the full extent of earthquake damages back in 1994.

The *Vu* court concluded that California appellate courts had authored conflicting opinions interpreting the "inception of the loss" provision. Accordingly, the Ninth Circuit certified the following question to the Supreme Court of California:

> Where an insured presents a timely claim to his insurer for property damage under a policy, and the insurer's agent inspects the property but does not discover the full extent of covered

> damage, does California Insurance Code § 2071 bar a claim brought by the insured more than one year after the damage was sustained but within one year of his discovery of the additional damage? Or, to put the matter differently, does *Neff v. New York Life Ins. Co.*, 30 Cal.2d 165, 180 P.2d 900 (1947), remain good law?

Vu, 172 F.3d at 727.

The California Supreme Court accepted the certified question. *See* Cal. S.Ct. Minutes (July 28, 1999), Case No. S078271. The Supreme Court has not yet scheduled the matter for hearing.

This Court acknowledges that the California Supreme Court's eventual decision in *Vu* could touch upon the issue presented by Allstate's motion for summary judgment. Nevertheless, *Vu* appears distinguishable on the ground that the insured discovered additional damages at a later point in time following the initial adjustment and settlement. The Houses do not allege later-discovered damages in their claims.

In any event – whether the *Vu* opinion would control the result or not – this Court is not prepared to wait upon the California Supreme Court. This Court has an obligation to decide the cases on its docket, resorting to abstention only in truly exceptional circumstances. *See Allegheny County v. Frank Mashuda Co.*, 360 U.S. 185, 188-189, 79 S.Ct. 1060, 3 L.Ed.2d 1163 (1959). Unlike the Ninth Circuit, this Court cannot certify questions of law to a state authority. *See* Cal.App. R. 29.5 ("The California Supreme Court may answer questions of law certified to it by the Supreme Court of the United States, a United States Court of Appeals, or the court of last resort of any

state, territory, or commonwealth."). Thus, despite the minimal risk that *Vu* will alter the landscape of jurisprudence in California, the Court must rule now.

DISPOSITION

The Court *grants* Allstate's motion for summary judgment with respect to the claims brought by Plaintiffs James and Pat House.

IT IS SO ORDERED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

VITO CAMPANELLI; PEGGY CAMPANELLI; JOHN CAUDILLO; BARBARA CAUDILLO; NEIL DAMROW; GAYLE DAMROW; NANCY DURRANT; GARFIELD ECUNG; DEBRA ECUNG; GEORGE GIAKOUMAKIS; MARY LOU GIAKOUMAKIS; DONALD HUNER; TOMMIE JENKINS; CARRIE JENKINS; BRENDA KALOSH; DONALD MENCK; FLORENCE MENCK; CHERYL MONDHEIM; WILLIAM NOAH, TERRY NOAH; ROY ROSENBLATT, LORRAINE ROSENBLATT; DARLA SEVERN; LOYAL SMITH; MILDRED STAFFORD; MARILYN TABER,

Plaintiffs,

and,

JAMES HOUSE; PAT HOUSE,

Plaintiffs-Appellants,

v.

ALLSTATE LIFE INSURANCE COMPANY, an Illinois Corporation,

Defendant-Appellee,

and

SHADOWBROOK DESIGN GROUP, INC., a California Corporation; W.S.C., a California Corporation, dba Western States Construction, dba Western States Geotechnical, aka Western States Companies,

Defendants.

No. 00-55466

DC No. CV 98-7185 RJK

ORDER

(Filed Jun. 2, 2003)

VITO CAMPANELLI; PEGGY CAMPANELLI; JOHN CAUDILLO; BARBARA CAUDILLO; NEIL DAMROW; GAYLE DAMROW; NANCY DURRANT; GARFIELD ECUNG; DEBRA ECUNG; GEORGE GIAKOUMAKIS; MARY LOU GIAKOUMAKIS; JAMES HOUSE; PAT HOUSE; DONALD HUNER; TOMMIE JENKINS; CARRIE JENKINS; BRENDA KALOSH; DONALD MENCK; FLORENCE MENCK; WILLIAM NOAH, TERRY NOAH; ROY ROSENBLATT, LORRAINE ROSENBLATT; DARLA SEVERN; LOYAL SMITH; MILDRED STAFFORD; MARILYN TABER,

Plaintiffs,

and,

CHERYL MONDHEIM,

Plaintiff-Appellant,

v.

ALLSTATE LIFE INSURANCE COMPANY, an Illinois Corporation,

Defendant-Appellee,

and

SHADOWBROOK DESIGN GROUP, INC., a California Corporation; W.S.C., a California Corporation, dba Western States Construction, dba Western States Geotechnical, aka Western States Companies,

Defendants.

No. 00-55468

DC No.
CV 98-7185 RJK

VITO CAMPANELLI; PEGGY CAMPANELLI; JOHN CAUDILLO; BARBARA CAUDILLO; NEIL DAMROW; GAYLE DAMROW; NANCY DURRANT; GARFIELD ECUNG; DEBRA ECUNG; JAMES HOUSE; PAT HOUSE; TOMMIE JENKINS; CARRIE JENKINS; BRENDA KALOSH; DONALD MENCK; FLORENCE MENCK; CHERYL MONDHEIM; WILLIAM NOAH, TERRY NOAH; ROY ROSENBLATT, LORRAINE ROSENBLATT; DARLA SEVERN; LOYAL SMITH; MILDRED STAFFORD; MARILYN TABER; DONALD HUBER; LORRAINE ROSENBLATT,

Plaintiffs,

and,

GEORGE GIAKOUMAKIS; MARY LOU GIAKOUMAKIS,

Plaintiffs-Appellants,

v.

ALLSTATE LIFE INSURANCE COMPANY, an Illinois Corporation,

Defendant-Appellee.

No. 00-55957

DC No. CV 98-7185 RJK

VITO CAMPANELLI; PEGGY CAMPANELLI; JOHN CAUDILLO; BARBARA CAUDILLO; NEIL DAMROW; GAYLE DAMROW; NANCY DURRANT; GARFIELD ECUNG; DEBRA ECUNG; GEORGE GIAKOUMAKIS; MARY LOU GIAKOUMAKIS; JAMES HOUSE; PAT HOUSE; DONALD HUNER; TOMMIE JENKINS; CARRIE JENKINS; BRENDA KALOSH; DONALD MENCK; FLORENCE MENCK; CHERYL MONDHEIM; ROY ROSENBLATT, LORRAINE ROSENBLATT; DARLA SEVERN; LOYAL SMITH; MILDRED STAFFORD; MARILYN TABER,

Plaintiffs,

and,

WILLIAM NOAH; TERRY NOAH,

Plaintiffs-Appellants,

v.

ALLSTATE LIFE INSURANCE COMPANY, an Illinois Corporation,

Defendant-Appellee,

and

SHADOWBROOK DESIGN GROUP, INC., a California Corporation; W.S.C., a California Corporation, dba Western States Construction, dba Western States Geotechnical, aka Western States Companies,

Defendants.

No. 00-57080

DC No.
CV 98-7185 RJK

Before: BRIGHT*, GOODWIN, and TASHIMA, Circuit Judges.

The petition for panel rehearing is denied.

* Honorable Myron H. Bright, United States Circuit Judge for the Eighth Circuit, sitting by designation.

§340.9. Insurance Claim for Damages Arising Out of Northridge Earthquake of 1994; Revival of Cause of Action.

(a) Notwithstanding any other provision of law or contract, any insurance claim for damages arising out of the Northridge earthquake of 1994 which is barred as of the effective date of this section solely because the applicable statute of limitations has or had expired is hereby revived and a cause of action thereon may be commenced provided that the action is commenced within one year of the effective date of this section. This subdivision shall only apply to cases in which an insured contacted an insurer or an insurer's representative prior to January 1, 2000, regarding potential Northridge earthquake damage.

(b) Any action pursuant to this section commenced prior to, or within one year from, the effective date of this section shall not be barred based upon this limitations period.

(c) Nothing in this section shall be construed to alter the applicable limitations period of an action that is not time barred as of the effective date of this section.

(d) This section shall not apply to either of the following:

(1) Any claim that has been litigated to finality in any court of competent jurisdiction prior to the effective date of this section.

(2) Any written compromised settlement agreement which has been made between an insurer and its insured where the insured was represented by counsel admitted to the practice of law in California at the time of the settlement, and who signed the agreement. **Leg.H.** 2000 ch. 1090.